United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

APPELLANT'S BRIEF

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 13263

ARTHUR THEODORE HENNEFED

Appellant,

Vs.

MR. LEO P. GAFFNEY

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

I. WILLIAM SHEMPP,

Attorney for the Appellant

1123 Warner Building

Washington, D.C.

TABLE OF CONTENTS

SUBJECT INDEX AND TABLE OF CASES

TABLE OF CASES

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 13263

ARTHUR THEODORE BERNHARD, Appellant

vs.

DR. LEO P. GAFFNEY, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Sections 1291 and 1292 of Title 28, U.S.C. and the United States District Court for the District of Columbia had jurisdiction of the cause of action under Title 11, Sec. 11-306, D.C. Code, 1951 Ed., to hear and review the action brought by Arthur Theodore Bernhard against Dr. Leo Gaffney for negligence in connection with an operation performed on the plaintiff-appellant and matters concerning the pre and post-operative care given the plaintiff-appellant. The District Court upon application of the defendant-appellee , directed a verdict in favor of the defendant-appellee at the end of the plaintiff-appellant's case. From this final action , your appellant appeals.

STATEMENT OF THE CASE

Arthur T. Bernhard, appellant here and the plaintiff below, sued Dr. Leo B. Caffrey for malpractice and negligence as a result of an incisional hernia developing after the doctor had performed a laparotomy, an exploratory operation , which disclosed, after being opened up, that the plaintiff did not have any of the symptoms or conditions the doctor claimed the plaintiff was suffering from.

The facts are that Mr. Bernhard, suffering from various ailments and having gone to and been a patient at various Veteran's hospitals, went to Dr. Caffrey in November of 1951 for relief. The doctor agreed to operate and determine what was wrong. He did thereafter operate and did not find any of the conditions he said might be present. But, soon thereafter, in less than three weeks, the plaintiff developed an incisional hernia in the area where the operation was performed. The doctor made no attempt to treat the plaintiff for this injury . Thereupon, the plaintiff filed the suit in question for $150,000.00 representing special and general damages against Dr. Caffrey. (App. I)

At the trial, the plaintiff introduced evidence and witnesses who testified to matters that the plaintiff contends established the negligence and malpractice of the defendant committed against the plaintiff, resulting in serious, permanent injury and extensive damages. The defendant was then called as a witness by the plaintiff and cross-examined as to the history of the case. At the conclusion of the defendant's testimony the defendant's counsel moved for a directed verdict in favor of the defendant and against the plaintiff. The court granted the motion and this concluded the case.(App II) The plaintiff noted an appeal.(App. III)

STATEMENT OF QUESTIONS PRESENTED

1. The question is whether there was sufficient evidence of negligence and malpractice to go to the jury in a malpractice action in which the trial court directed a verdict in favor of the defendant.

2. The question is whether there was sufficient evidence indicating that the proximate cause of the appellant's condition after his operation, was due to the appellee's negligent pre and post operative care, thus creating a question for determination by the jury, and not by the court.

3. The question is whether the case should have gone to the jury because of the great amount of conflicting testimony presented by the plaintiff and defendant in the lower court.

4. The question is whether, from the facts and evidence presented, the doctor used the proper standard of care and skill necessary in his pre and post operative treatment, since it was contended by appellant that he was abandoned by the appellee after he discovered that the appellant developed an incisional hernia as a result of the operation performed on the appellant by the appellee.

5. The question is whether the court erred by abusing its judicial discretion by making arbitrary rulings during the trial, much to the prejudice of the plaintiff's case.

SUMMARY OF ARGUMENT

1. The court erred as a matter of law in directing a case to be concluded by rendering a verdict in favor of the defendant and against the plaintiff, thus disallowing the jury to decide in light of the evidence presented, if there was, in fact, proof of negligence and malpractice. Based upon the evidence adduced by the plaintiff and from testimony offered by his witnesses, and the testimony given by the defendant on direct examination, the Court should have allowed this case to go to the jury upon the issues and questions of negligence and malpractice. The evidence and case of the plaintiff submitted enough proof of negligent conduct and actions on the part of the defendant, to cause the Court to submit his case to the jury upon the grounds and issues of the defendant's negligence. Plaintiff further contends most certainly that he adduced and produced during the trial, sufficient and ample proof and evidence of the negligence and negligent conduct and acts of malpractice of the defendant towards him, to warrant the Court submitting his case to the jury upon the issues and questions raised.

2. The Court erred in not allowing the case to go to the jury since sufficient evidence was presented to indicate that the proximate cause of the plaintiff's present complaint was due to the appellee-defendant's negligent conduct pertaining to the pre and post operative treatment afforded the plaintiff, thus creating a firm question which should have been decided by the jury, and not the Court. This was error as a matter of law.

3. The Court erred in not allowing the case to go to the jury since there was a volume of conflicting evidence offerred by the plaintiff and his witnesses and the defendant, a matter as to law, which should have been decided by the jury and not the Court.

4. The question as to whether or not the defendant used the proper standard of skill and care necessary in his pre and post operative treatment, in light of evidence presented that the defendant abandoned the plaintiff after discovering that an incisional hernia had developed after the defendant had operated on the plaintiff, was a question for the jury and not the Court.

5. The Court erred , as a matter of law, by making arbitrary rulings, much to the prejudice of the plaintiff, and in doing so, abused its judicial discretion , beyond the point, where, no matter what evidence would have been presented , the verdict ordered, would have been the same.

ARGUMENT

The trial Court erred in directing a verdict for the defendant and against the plaintiff while there was sufficient evidence and proof offered by the plaintiff that negligence and negligent conduct and malpractice had been committed by the defendant against the person of the plaintiff, whereas the prop the proper procedure would have been to send the case to the jury on the grounds of the defendant's negligence as well as the issues of the defendant's negligence.

The plaintiff had completed the presentation of his case with respect to the questions and issues of negligence and malpractice of the defendant and the liability of the defendant for his injuries and damages. The Court determined, without the defendant presenting his case at all, accepted the motion of defense counsel for a directed verdict in favor of the defendant and against the plaintiff, and thereupon took the case from the jury. (Appendix p. 28) Clearly, this was a wrong application of the law and error on the part of the Court.

At that time, the Court had before it, ample evidence to warrant this case going forward; the defendant should have been directed to put his case on and offer his evidence to purge himself of any accusation of negligence and malpractice, and then the case should have been given to the jury to determine the facts upon the question of negligence, negligent conduct and malpractice under the doctrine laid down in the Fawcett v Bergmann et al case 57 App. D.C. 290, 291, 22 F. 2d. 718, by Chief Justice Martin, who said, " It is settled law that a motion to direct a verdict against the plaintiff is an admission of every fact in evidence tending to sustain his case and of every inference reasonably deducible therefrom, and that the motion can be granted only when but one reasonable view can be taken of the evidence and the conclusions therefrom, and that view is utterly opposed to the plaintiff's right to recover."(citing) Glavis v Wash. Southern Ry Co., 30 App. D.C. 579

Continuing, Justice Martin decided, in quoting from Grand Trunk Railway V. Ives, 144 U.S. 408, 417, 12 S. Ct. 679, 683 (36 L. Ed. 485) that " It is a familiar rule in negligence cases that, 'when a given set of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court.'"

In Cumming v Cooley, 58 App. D.C. 304, 305, 30 F 2d. 467, Chief Justice Martin in citing the decision rendered in Richmond and Danville R. Co. v Powers, 149 U.S. 43, 45, 13 S. Ct. 748, 749 (37 L. Ed. 642) said,---"It is well settled that where there is an uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be stttled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them. " The Court, using the language set down in Baltimore and P.R. Co. v Carrington, 3 App. D.C. 101, 108, also stated that "The right to have the facts determined by the jury ceases only when but one reasonable view can be taken of the evidence and of its every intendment, and that view is utterly opposed to the plaintiff's right to recover."

In the case now before this Honorable Court a recitation of pertinent parts of the testimony and evidence offered, will surely indicate to the Court that the facts were sufficient enough to allow this matter to be determined by the jury and not by the lower court.

In Adams v Washington and G.R. Co, 9 App. D.C. 26, 30, it was decided that. "The court is never justified in directing a verdict except in those cases where, conceding the credibility of the witnesses and giving full effect to every legitimate inference that may be deduced from their testimony, it is nevertheless plain that the party has not made out a case sufficient in law to entitle him to a verdict and judgement thereon."

The instant case now before this Honorable Court will, without doubt, prove that the plaintiff did make out a case sufficient in law to have allowed it to go to the jury.

And there were some superficial veins on the skin of the abdominal wall. There is a hard mass filling the entire upper abdomen, extending down to the level of the navel. It is quite smooth and rather tender. There is no fluid wave present. That is, I could not detect any fluid in the abdominal cavity. The genital organs were normal. Rectal examination revealed no hemorrhoids or rectal masses. And the prostate gland enlarged about two times the normal size. The extremities are normal, except for slight edema of the ankles." (Tr. p. 16, 16)

Dr. Caffrey also noted that the patient told him that he had a feeling of fullness, and a hard, tender mass in the upper part of his abdomen. He continued telling the court that Mr. Bernhard had been feeling poorly for three years. Fullness and nausea occur after meals. He belches a great deal and is tired constantly. Has had a bad taste in his mouth for most of this time. He has had attacks of diarrhea during the past three years. Stools have been clay-colored at times. He has gained 24 pounds in the past year. He has had insomnia for the past three years. (Tr. p. 15.)

Questioned about his notes, Dr. Caffrey stated that his notes did not indicate any scars on the patient's body, nor did he see any pimples on Mr. Bernhard's neck, nor that Mr. Bernhard ever said anything about any scars. (Tr. p. 16.)

Q. Did you make any mention to him about these scars ?

A. I didn't see any scars.

The doctor then testified that Mr. Bernhard had brought to him his records from Perry Point hospital which described what had been done to the patient (Tr. p. 16, 17) and that he read the record after Mr. Bernhard left his office following the first visit and examination, and that he had studied it. (Tr. p. 16, 21) Dr. Caffrey stated that he was not satisfied that there was a history of syphilis present, although he said that he noted a one plus Wassermann...."and I also noted from the Perry Point history and from my history there was no history of syphilis * * * No history of having had active syphilis at any time." (Tr. p. 17.)

Questioned by the Court as to whether a person could have a positive Wassermann test without having syphilis, the doctor answered, "No." (Tr. p. 17.)

The doctor was again questioned if he had made a very thorough study of the report from Perry Point and his answer was, "That is right." (App.p.17)

Q. You noticed no scars ?

A. No.

The clinical record heretofore marked as Plaintiff's exhibit No. 2 was admitted in evidence and counsel for plaintiff read (App. p. 17.)....

" No fluid wave was demonstrable. There was one plus feet and ankle edema. Distended veins were noted over the chest and abdomen, most marked on the right side. There was an ulcerated lesion on the medial aspect of the right foot, with some weeping."

After being prodded by both counsel for plaintiff and the Court, Dr. Gaffney finally admitted that the ulcerated lesion was a break in the skin ....a plain ulcer which is leaking. (App p. 18.)

Yet, a short time before he testified that he did not see any scars on the man's body. (App p. 17.)

The defendant then testified that for three years from 1932 to 1935 25% of his patients at D.C. General Hospital were "in some stage of a syphilitic problem." (Tr. 7.) —and that when he examined the patient, according to his records, the patient did not have an ulcerated lesion of his foot. (App.p. 18.)

Upon being confronted with the clinical record again Dr. Gaffney was questioned thusly: (App p. 18)

Q. Dr. Gaffney, in your examination of Mr. Bernhard at your office, you stated you saw no scars on his body whatsoever. Did you remember by any chance in the reports from Perry Point a notation that he had been operated on for an appendectomy several years ago ?

A. I knew he had been operated on for an appendectomy. That is my record. You are talking about ulcerations and lesions on his feet.

Q. No , I am not talking about that now.

A. I have a note in my record that he has an incision scar from an appendectomy. So I knew he had been operated on. I knew he had an appendectomy.

Q. Did you read that previously ?

THE COURT. What does an appendectomy have to do with this

case, Mr. Stempil ?

The witness interrupted (reading) "Appendectomy at the age of 14."

Mr. Stempil then answered,

"Your Honor, the Doctor testified that there were no scars on the man's body.

THE COURT: I see. Very well.

The appellant contends here and now that when the doctor read his office report on the examination made of Mr. Barnhard (App. p. 15 and 16) he made no mention of any scars, but when confronted with the very records he had in his possession (those of Berry Point) he then makes the statement, under oath, that " I knew he had been operated on for an appendectomy. That is my record. (The underscoring is by appellant for emphasis.) * * * * I have a note in my record that he has an incision scar from an appendectomy." (App. p. 18.)

Therefore, from this point on, it is hard for appellant to ask this Honorable Court to agree with the lower court, that there was no basis of fact upon which to allow this case to go to the jury or that only one reasonable view could have been taken of the evidence and conclusions thereof. We maintain there was a difference of plain evidence and a question of pertaining to the accuracy of the records in the hands of the defendant. This alone should have been sufficient for the court to allow the cause to be decided by the jury.

Mr. Barnhard testified that he was not furnished with any support for the incision after the operation, just some gauze over the incision, and some adhesive going crosswise. (App. p. 12.)

Dr. Caffrey stated that he put adhesive tape around the incision... * * * large padding of gauze, with wide adhesive strips covering the entire wound, extending around the patient's sides." (App. p. 24.) and that in his opinion it was sufficient to take care of anything that might have happened with reference to breaking open of the wound. (App. 24.)

However, Mr. Barnhard testified that the bandage was so loose around the incision that he was able to show it, the incision, to his wife and Mrs. Christopherson, the registered nurse who was at his home when he returned from the hospital. (App. p. 9 and 10 for Mrs. Christopherson's view and page 12.

of the transcript for Mrs. Bernhard's views.)

The plaintiff testified that after being released from the hospital he still had the stitches in him and they were not taken out until he went to Dr. Caffney's office on January 18, 1952. (App p. 2.)

The testimony that the stitches were still in the defendant when he returned from the hospital was corroborated by Mrs. Christopherson (App p. 9) and by Mrs. Bernhard, who when questioned thusly: (App p. 12)

Q. Did you have an occasion to see your husband's incision right after being released from the hospital and taking him home ? answered...

A. Yes, at home he showed it to me.

Q. Can you describe to the Court what you saw ?

A. Well, I saw stitches and scars that looked like a turkey or some fowl sewed up and prepared for the oven. * * * "

Yet, Dr. Caffney, testifying, but carefully avoiding answering any question directly, stated (App p. 22)

A. The hospital records—— I am quoting from the hospital records. On the 15th of January, Mr. Bernhard was visited, his sutures were removed, and the wound is clean and healing; patient feels fine; and discharged——signed by me ." * * * THE COURT. You say the sutures were removed before the patient was released from the hospital ?

THE WITNESS. That is the note on the hospital record, signed by me.

Not once did Dr. Caffney say that he, personally, removed the stitches. The closest to that is that he says,...."I am quoting from the hospital records." (App. p. 22.)

Here now, we have another situation where the plaintiff, the registered nurse and the plaintiff's wife all testified that the stitches were still in the plaintiff when he returned from the hospital and the doctor, reading or "quoting from the hospital records" says....his sutures were removed. Is not this difference in testimony something to be determined by a jury and not by the court ? We say, and beg this Court to agree with us, that, this was a question for the jury.

Dr. Caffrey testified that he knew that the plaintiff had a history of a cough and that he had had several attacks of diarrhea prior to the date of operating on Mr. Barnhard. (App p. 193) and (App.p. 207)

Q. Didn't you know that he had diarrhea prior to going to the hospital ?

A. Prior to the hospital admission, he had diarrhea during the past three years, at times -- not just prior to going to the hospital.

Q. You also noted he had had a cough prior to going to the hospital.

A. He had a cough for years.

Q. You didn't take that into consideration when you operated on him.

A. I did. I told him to cut down smoking, a month before I operated on him.

Q. And you feel that was sufficient to take care of anything that might have happened or would happen if the operation, the closing up process went wrong ?

* * * *

A. The closing up process didn't go wrong.

* * * * *

A. He asked me if the closing process went wrong. I say it didn't go wrong, the closing process.

The witness was well aware of his answer because he limited it to the fact that, in his words, the closing up process didn't go wrong, yet when he was asked (App p. 210)

Q. Did Mr. Barnhard's wound heal as quickly as you would have expected it ? ..... he answered

A. No.

Q. Why ?

A. Because of his development of a cough and some distention and diarrhea in the hospital.

The witness further testified that he did not take any blood tests in his office nor in the hospital after the operation (App p. 196) or that he noticed any nodules on Mr. Barnhard's neck or arms. (App p.49)

Dr. Gaffney also testified previously and very emphatically (App. [illegible]) that * * * * "from my history there was no history of syphilis."

How he arrived at that determination was never inquired because he testified that he did not give Mr. Bernhard any tests either at his office or after the operation, but . . . . . .

Mr. Bernhard testified that when he learned that the only way he could try to make a living was to drive a cab, since the incisional hernia kept him from getting his job back with Civil Service (App. p. [illegible]) and to his surprise , Mr. Daily, counsel for the defendant, made it possible for him to answer that the first knowledge he had of any positive test (for syphilis) was when he took his examination for the cab. (App. [illegible]). That colloquy went thusly:

Q. The first knowledge you had of any positive test was when you took your examination for the cab. Is that correct ?

A. Yes, sir. (App. p. [illegible].)

During the direct examination of the plaintiff regarding his discovery of having syphilis, after the operation, the questions and answers went like this: (App. p. 5.)

A. I applied for a hacker's license in the District of Columbia. * * * * That was in the latter part of March or the first of April * * * * in 1972. The license was issued April 30, 1972.

Q. When you made your application for the license, did you fulfill all of the requirements ?

A. No, sir.

Q. What was the difficulty ?

A. Well, after the doctor examined me, he said I had . . .

Q. Wait just a moment. You said after the doctor examined you. Is there a doctor's examination necessary to secure it?

A. Yes, sir. You have to have a physical examination. First you have to pass a written test, and then you are given a physical examination. And the doctor turned me down because I had a positive syphilis test, which was the first time I knew I had anything like that. * * * *

THE COURT. What kind of a test did you take, sir ?

THE WITNESS. A Wassermann test for syphilis. * * * that is what the doctor said. * * * * After treatment, I was licensed. * * * * I think it was eight days I was receiving 5,000,000 units of penicillin. (App. p. 5.)

Here again your appellant believes the court erred when it did not allow this cause to be determined by the jury since evidence was introduced by Dr. Caffrey that his records (?) indicated no history of syphilis, while in black and white on the Perry Point records it was indicated, and then Mr. Bernhard testified, without being challenged, that he was found to have syphilis less than three months after leaving the hospital. We contend this type of negligent pre and post operative care is solely the fault of the defendant and that he should be held liable for the curing of the incidental hernia, not only because of not checking on the healing methods in a person suspected of having syphilis, but also for not taking proper steps to prevent the hernia from being created when he knew, that is, Dr. Caffrey knew, that the plaintiff had a cough, a bad cough, direction, and distention , without taking any steps to correct the possible causes of this hernia. We contend further that this was negligence per se and might even go further and say this was malpractice in the first degree.

The defendant knew and admitted to the Court that (App. p. 22)

"I have on them his cough and some distention he had, and quite a bit of vomiting caused premature abortion of the sutures and breaking of them."

It was admitted by the defendant that the records of Perry Point were in his possession (App. p. 13) and said report was admitted into evidence (App. p. 17) and in part read.....'Distended veins were noted over the chest and abdomen, most marked on the right side."

Therefore, all of the symptoms and indications were at the doctor's fingertips, yet he allowed the patient to be dismissed by him after the hernia was discovered and never, to this day, has offered to do anything about it.

These records are not made without foundation, and will be proven now, but before doing so, it may be well to call to the attention of this Honorable Court that in the report of Perry Point noted just above...that the distended veins over the chest and abdomen were most marked on the right side.

Dr. Gaffney testified in describing the operation performed on Mr. Bernhard (App p. 24) that "The incision was made below the rib margin on the upper right right side.

Here was another indication that the defendant knew of a pre-existing condition (the distention) by his own admission as to what was one of the causes of the hernia and from the records of Jersey Point which he knew quite well.

The appellant contends such being the case, the question of liability and negligence was, as a matter of law, a question, not for the court to decide, but for the jury.

Mr. Bernhard testified that he returned to Dr. Gaffney for post operative treatment three times...January 15, 1952, January 23, 1952 and January 28, 1952 (App p. 24, 25,) and described the treatment given each time.

A. Well, the doctor took my dressing off and he took a pair of blunt scissors and stuck it into me and let some fluid out of me. He took the stitches out.

Q. Was that the first time he took the stitches out ?

A. Yes, sir.

Q. What else did he do after he took the stitches out ?

A. He put another bandage on and told me to come back in five days.

Q. Did you go back in five days ?

A. I did.

Q. What did he do then ?

A. He took the bandage off, and he felt of me all over , or around the incision, and put another bandage in and told me to come back in another four or five days.

Q. Did you go back in another four or five days ?

A. I did.

Q. What happened then ?

A. The same thing the second time. He took the bandage off and

and probed it---I guess that is what they call it---put his fingers into me; and put another dressing on it. And I said, "When shall I come back?"

And he said, "You don't need to come back."

And I said "Shall I go to my own doctor and get treated for my liver?" And he told me "Yes."

Q. What else did he tell you.

A. That is all.

Q. Try and recall, Mr. Bernhard. Did he say anything to you concerning an incisional hernia at that time ?

A. Positively not.

Q. Did there ever come a time that you learned that you had an incisional hernia ?

A. Yes, sir.

Q. When ?

(App p. 4)

A. Oh, it was a matter of, well, within the next ten days. I don't know the exact date. I went back to my family doctor for liver treatment and he informed me that I had an incisional hernia. * * * * * *

Q. You knew, after the third office visit to Dr. Gaffney, that you had an incisional hernia ?

A. No, sir.

Q. I will repeat the question. Perhaps I used the wrong language. Did you learn, after the third visit to Dr. Gaffney, that you had an incisional hernia ?

A. Yes, but not from Dr. Gaffney. * * * * * *

BY MR. SENECA. You testified that you went to your family doctor, at the suggestion of Dr. Gaffney, after the third visit ?

A. Yes, sir.

Q. So that you could be treated for your liver ?

A. Yes, sir.

BY MR. BAIER. If your Honor, please, I didn't understand that to be his testimony. He said he went there for the treatment of his liver, not that Dr. Gaffney told him.

THE COURT. The testimony was, as the court recalls it...and the

jury's recollection is what governs--that the witness asked Dr. Gaffney should he go to the (hospital)(the Court must doctor) for treatment of his liver; and the doctor said yes.

MR. STENGEL. Go to his family doctor.

THE COURT. But please don't go over the same ground more than once, Mr. Stengel. There is no time for repitition. (App. p. 4.)

Dr. Gaffney stated that Mr. Lambert's first visit after being released from the hospital was on January 18, 1952. * * * (App. p. 22)

A. My records indicate that there was some serum in the wound, which was released. The wound was redressed and the patient advised to return to my office in five days. * * * * * * * *

A. The second visit was on the 23rd. This is five days later--at which time there was more serum released. And we (App. p. 23) found some separation of the fascial edges, that is the deep layers. That was the beginning of the hernia.

Q. How did you find that ?

A. By feeling. * ** * * *

Q. Did you tell him he had a hernia ?

A. It was not definite at that examination. As I say, I felt some separation deep. And I redressed him and advised him to return on the 28th.

THE COURT. Did he return ?

THE WITNESS. He returned on the 28th.

BY MR. STENGEL. What do your records indicate then ?

A. My records indicate that the patient definitely now has an incisional hernia. He was informed of this and told it should be observed for a period of four weeks, when he would return to my office.

After questioning by both Mr. Stengel and the Court, the witness stated that Mr. Lambert did not come back. (App. p. 24) Mr. Stengel, in addressing the Court in an attempt to set the record straight that the witness did not tell Mr. Lambert to come back to his office in four weeks, according to the witness' own record, was informed by the Court not to comment on the evidence. "The Court alone has the right to comment on the evidence."

Dr. Gaffney then was asked, (App p. 23)

Q. Did you inform him that he had an incisional hernia ?

A. I did.

Q. What steps did you take to correct it at that time ?

(App page 23)

A. There were no steps as I deemed advisable for him to take at that time. * * * * You have to wait a certain period of time until the tissue regains its normal tone, before you recuperate on these people.

Q. How big was that incisional hernia ?

A. How big ? Oh, I think the incision is about six inches long, maybe. The hernia incision was through mostly the upper part of it, the upper and middle part. Of course, it has gotten larger since then. (Underlined by appellant for emphasis.) * * * *

Q. How do you know it has ?

A. It happens I examined him a few weeks ago * * * * here.

Q. Here in the court-room, and you found that it had gotten larger ?

A. Oh, yes.

Note:-The first trial ended in a mistrial with the discharge of a juror. That is the time referred to by Dr. Gaffney when he examined the plaintiff.)

---

* * * *

Q. Did you make any suggestion to Mr. Barnhart at that time ?

* * * * *

A. No, I didn't recommend anything at that time.

Appellant submits all of this leads him to pray that this Honorable Court find that he was dismissed by the doctor to suffer until such time as the doctor decided that maybe it was time to recognize and correct the mistake he created.

Dr. Gaffney testified as to what dressings he applied when Mr. Barnhart returned to his office for post operative care and stated (App p. 24) at the third visit, there was no dressing applied at all.

This, he admits, even after finding that the appellant positively had an incisional hernia! No dressing....no binder....no support....nothing!

In an attempt to try and get at least one segment of this case in tune with what the plaintiff testified to, Counsel for appellants asked Dr. Guffney, (App p.24[illegible])

Do you recall telling Mr. Bernhard to go to his family doctor and start on a diet after the 5th.

A. To go back and go on his diet, for his liver disease, yes.

Q. You did tell him that ?

A. I imagine I did. That is where he went.

Q. To his family doctor ?

A. Yes, Dr. Galarza.

Q. Did you talk to Dr. Galarza ?

A. Yes, I talked to him while Mr. Bernhard was in the hospital, as a matter of fact.

Q. After the last visit, January 28, 1952 ?

(Tr. [illegible])

A. I don't recall whether I talked to him or not ?

Q. Do your records indicate that ?

A. My records indicate nothing after the man left my office on the 28th of January. That is the last I saw of him until this trial.

Dr. Guffney immediately there admits that Mr. Bernhard was sent to his family doctor for treatment and Mr. Bernhard testified that he asked Dr. Guffney if he should go to his family doctor for treatment of his liver and diet. For the first time both the plaintiff and defendant agree that the plaintiff, after the third visit to Dr. Guffney, was sent to Dr. Galarza for further treatment "for his liver disease." But again, there is a difference in their statements. Dr. Guffney says he told Mr. Bernhard that he had an incidental hernia while Mr. Bernhard insists that the first time he knew about the hernia was when Dr. Galarza told him about it.

Once before, Dr. Guffney and Mr. Bernhard differed in their statements. Dr. Guffney testified that his records did not reveal active syphilis while Mr. Bernhard gave uncontroverted testimony that he was refused a ~~sh~~ license because he was suffering from active syphilis less than three months after leaving the hospital.

Your appellant contends that just these two instances should have been enough for the court to keep hands off of this trial and allow it to proceed and permit the jury to decide the issues.

Before citing precedents to fit this case, your appellant feels that a resume of the witnesses' testimony, that of Mrs. Christopherson and Mr. Barnhart would subserve the body of this argument to a point where the action of the lower court will be plainly indicated as being wrong in law and equity.

Mary Malinda Christopherson, a registered nurse, whose qualifications were admitted, was called and duly sworn as a witness for the plaintiff. (App p. 5.)

Mrs. Christopherson testified that she was a registered nurse and had worked at Bohemian Hospital as a relief nurse and that on occasion was assigned to the operating room (App p. 47.) for four years.

She further testified that she was a fourth cousin to Mr. Barnhart's wife and that she was at Mr. Barnhart's home when he returned from the hospital on January 15, 1932 and knew that he had been operated on. (App p 48)

Mrs. Christopherson testified that she saw the incision because Mr. Barnhart showed it to her (App. p.48) but (App p. 49) "I wouldn't say it was a supporting bandage.

Over the objection of the defendant's counsel on being asked if, in her opinion the bandage on the incision was sufficient to support the incision, the court allowed her to answer, "It was not a supporting bandage."

THE COURT. I think a nurse can express an opinion as to whether a particular bandage was sufficient to support an incision. * * * Of course, there are a great many things that would be beyond the expert capacity of a nurse to testify to; but this question I think is within the purview of a nurse."

Mrs. Christopherson stated that she recommended that Mr. Barnhart put a tight binder on himself.

To this, the Court sustained the objection made by the defendant's counsel, saying "* * *, as to what she recommended to the defendant. (The court obviously meant the plaintiff.) After all, there are specific limita-

tions on the capacity of a nurse to act as an expert in medical matters. Counsel for the plaintiff noted an objection to the Court's ruling in this instance. (App. p. 2.)

The witness was then questioned thusly:

Q. From your experience in hospitals and in operating rooms, is it the practice for surgeons and hospitals to provide binders after such an operation on such a person as Mr. Barnhart ?

To this question defendant's counsel objected, but was over-ruled by the Court which said, " I think if she knows what the practice is and if she has been around operating rooms, she may answer. Of course you have a right to rebut that, because those things may depend upon particular circumstances of the case. You may cross examine her about it later. I think she is qualified to answer.

The witness then answered, "Yes" to the question propounded to her and explained that " * * *, on a heavy person or a person with a cough (App. p. 9) like Mr. Barnhart had, when you get the patient out of bed, ordinarily you put a tight binder around them in order to give them other support, particularly with an incision over your diaphragm, which then you cough is going to put pressure against your incision. * * * * I was taught that when I was in training, and I have had different doctors order it for their patients.

Q. In your opinion, what is the purpose of that binder ?

A. To help give the patient better support.

Q. In your opinion, would this binder have prevented Mr. Barnhart from having the incisional hernia that resulted ?

Counsel for defendant objected and the court sustained same stating, " In order to make the record clear, I am sustaining the objection on two grounds. First, I think it is beyond the expert capacity of a person who is not a physician or a surgeon to express and an opinion of this kind; and, second, because that is purely speculative. It merely calls for an opinion as to that would have happened if something else had been done."

Appellant here believes this kind of opinion evidence is good and that the training of the nurse with her background qualified her to answer. In this instance we believed them as we do now, that the court erred.

Mrs. Christopherson testified, in her expert capacity , as to what she observed in operating rooms concerning the "closing up" processes and what type of stitches were used and what kind of material could be used. (App p.)

To a direct question, " From your own experience and observation in the operating room , was it a regular and accepted practice to use retention stitches on obese individuals like Mr. Bernhard ? . . . she answered,

"Yes."

Q. Or for persons who had coughs ?

A. Yes.

Dr. Page 30

Q. When you observed the incision on the day that Mr. Bernhard came home, did you see any retention stitches ?

A. No.

Q. Did you see any marks that would indicate that retention stitches had been there ?

A. No.

Q. Do retention stitches, after they are taken out, leave any special markings ?

A. For a period of time, yes. * * * there is a small place there where the suture is removed.

Q. Did you note any such scar on Mr. Bernhard ?

A. No.

In describing the operation performed on Mr. Bernhard, Dr. Gaffney testified that he used a retention suture in the fascia, (App p. 20) but nowhere did he state that he used a retention stitch on the outer layer of skin as suggested by Mrs. Christopherson. At another point, in being questioned regarding the practice of removing the sutures before the wound is completely healed and closed, in a person with a history of a cough, Dr. Gaffney said, "The skin sutures have nothing to do with causing of a hernia. This man's skin is intact. The question of hernia is down deeper, where the original sutures were placed in the fascia. * * * (App p. 22.)

Queried by the Court if he had any opinion as to what caused the hernia, the witness answered,"I have an idea his cough and some distention he had, and quite a bit of retching, caused premature abortion of the sutures and breaking of them." (App p. 22)

The doctor then testified that from the examination of the patient made before the operation he could not necessarily have foreseen this type of a situation (an intestinal hernia resulting.). (App. p.22.)

Counsel again ... " You say you took the sutures out at the hospital." The doctor refused to commit himself and explained, "To the hospital records say."

Nowhere did Dr. Gaffney ever waiver in the clear positive fashion regarding the stitches being removed, while Mrs. Christopherson was positive as to what she saw in this regard.

Appellant deems this difference of opinion was sufficient in fact and form for the jury to determine the issues, and not judge. His action in directing the verdict in this case in favor of the defendant , was arbitrary and without foundation in law.

Dr. Gaffney stated that he told Mr. Bernhard that...." I was going to do an exploratory operation, to make a definite diagnosis or confirm a diagnosis that had already been made, and if possible to perform corrective surgery for his condition." (App. p. 18.)

The Court then asked him, "And what was that condition." He answered, "The tentative diagnosis was, No. 1, cirrhosis of the liver; No. 2, possible cancer, with metastasis to the liver; and, No. 3, gall bladder disease. They were my three impressions after my examination. * * * * None of them could, Your Honor (be determined without an exploratory operation.)

Here, definitely was a question for the jury to be obtained from the evidence and testimony. But it was never submitted to them for consideration.

Questioned as to whether he ordered a Wassermann for Mr. Bernhard prior to the operation, the doctor answered in the negative. (App. p. 19.) Yet, the appellant contends Dr. Gaffney knew or should have known of the syphilitic condition, and his failure to take certain precautions were negligent acts, per se. The doctrine of res ipsa loquitur might be able to be sustained here...Mr. Bernhard had an incidental hernia before he went to Dr. Gaffney, but he sure did have one after Dr. Gaffney got finished with him.

Dr. Griffing was questioned by counsel for plaintiff thusly, (Supp. p. 20-21)

Q. You stated you had made your diagnosis. In the exploratory cutting open, did you find any of those symptoms that you had decided might be present.

A. I found a condition, not a symptom.

Q. Of the ones you spoke about ?

A. Yes.

* * * * * * *

Q. A liver metastasis ?

A. Metastasis of the liver; that is a disease.

Q. Did he have that ?

A. No, I have already testified he did not have cancer.

(Appellant cannot find any such statement made by the doctor.)

Q. Did he have gall bladder disease ?

A. No.

(See page 21)

Q. Then he had none of the three ?

A. He had the first one.

Q. He had cirrhosis of the liver ?

A. A type of cirrhosis of the liver - - - fatty metamorphosis of the liver.

Q. Will you refer to the pathology report you received.

A. I thereby have---fatty metamorphosis of the liver, is the diagnosis.

Q. Does it say cirrhosis of the liver ?

A. It says fatty metamorphosis.

THE COURT. Is that the same thing ?

THE WITNESS. It is a type of liver disease, a type of cirrhosis, a pre-runner of it.

BY MR. SMITH. It is a pre-runner of it ? Is it cirrhosis of the liver ?

A. It is a type of cirrhosis of the liver.

* * * reading from the microscopic examination presented to Dr. Gaffney by the pathologist at Providence Hospital, the document having been stipulated previously, counsel for appellant, read...." No evidence of cirrhosis. (See page 2[illegible].)

Q. Does the examination say no evidence of cirrhosis ?

The doctor answered, "It does."

Q. Then none of these three items that you diagnosed were actually present ?

A. I said that fatty metamorphosis was a forerunner of cirrhosis.

At this point the Court requested counsel for appellant not to argue with the witness, despite the earnest effort of counsel to get the doctor to admit that some of his guesses were right.

Appellant contends here and now that such testimony by the defendant was definitely of such nature that only a jury could have determined the veracity of some of the statements made by this witness, the plaintiff and his other two witnesses. By deciding to enter a directed verdict in favor of the defendant after such evidence was presented, the Court definitely went outside of its scope of power. This was strictly a question for the jury to decide.

An investigation made by appellant in Levis' Practice of Surgery 1946 edition, and further investigation made in Gray's Attorney's Textbook of Medicine, Third edition, 1951, fails to disclose anything that substantiates that fatty metamorphosis is a forerunner of cirrhosis.

In fact, the microscopic examination of the liver biopsy taken from Mr. Bernhard made for the last sentence, "There is, at the present time, in the medical standard, no evidence of cirrhosis or of any primary or secondary neoplasia." (This report was stipulated by both parties prior to the trial.) The words primary or secondary neoplasia evidently noting that there was no malignancy or cancer.

Appellant now prays this Honorable Court , in the interest of justice and fair play, to send this case back for retrial on its merits, because, investigation of Dr. Gaffney's testimony reveals , as noted above, that his diagnosis was without merit and the condition, was not, if the court below had allowed the case to proceed, as he said, a forerunner of cirrhosis. We believe his theory was a figment of his imagination.

Associate Justice Rutledge, now an associate justice of the United State Supreme Court, while a member of this Court, writing for the Court in the Christie v Callahan case, 75 App. D.C. 133, 124 F 2d 825, stated, " The question arises in two phases,--connection and negligence. Our function is not to weigh the evidence factually as the jury does. It is to decide whether plaintiff's case, as made, was strong enough for us to allow the jury to consider it. To do this, we must apply some standard! But we cannot weigh plaintiff's case against defendant's. Less than preponderance is sufficient. How much less is hard to state abstractly. Commonly, the case weighed, to stand, is required to be substantial (citing cases), more than a scintilla, such as reasonable men might believe. All these are just different ways of saying that less than preponderance is required but the evidence should not be so thin that it would be dangerous for the jury to consider it."

Your appellant here contends that he had a preponderance of evidence presented, not just a scintilla, and that evidence was not thin by any standard. It would not have been dangerous to submit his case to the jury. In fact, that was the proper thing to do. The lower court erred, as a matter of law, when it did not do so.

"Malpractice is hard to prove. The physician has all of the advantage of position. He is, presumably, an expert. The patient is a layman. The physician knows what is done and what is its significance. The patient may or may not know what is done. He seldom knows its significance. He judges chiefly by results. The physician has the patient in his confidence, divorced against suspicion. * * * In short, the physician has the advantage of knowledge and proof. This increases when he is a specialist. What therefore might be slight evidence when there is no such advantage, as in ordinary negligence cases, takes on greater weight in malpractice suits.* * * * Generally speaking, direct and positive testimony to specific acts of negligence is not required to establish it. Circumstantial evidence is sufficient, either alone or in combination with direct evidence. Circumstantial evidence may contradict and overcome direct and positive testimony. The limitation on its use is that the inferences drawn must be reasonable. But there is no requirement that the circumstances to justify the inferences sought , negative every other positive or possible conclusion. The law is not so exacting that it requires proof of

negligence or causation by testimony so clear that it excludes every other speculative theory.

" The Sweeney case (supra) does not deny these principles. Indeed, it appears to go further than they do and recognizes that in exceptional cases the results of medical or surgical treatment may be so gross in departure from those normally produced by competent and proper treatment that in themselves they are sufficient to sustain an inference of negligence."
So did Justice Rutledge rule in the Christie case, supra.

Appellant asks this Court to rule likewise, since he did present enough evidence and there was enough conflicting testimony to sustain an inference of negligence, thus creating a question for the jury....And it is in just such a case as appellant's that the court below should have kept 'hands off' the jury's business.

The Court erred in not allowing the case to go to the Jury since sufficient evidence was presented to indicate the proximate cause of the plaintiff's present complaint was due to the appellee-defendant's conduct pertaining to the work and the operative care and treatment afforded the plaintiff, thus creating a fact question which should have been decided by the Jury, and not by the Court. This was error as a matter of law.

Appellant maintains the law laid down in the Christie case is applicable to his circumstances and therefore the jury was the proper body to decide the issues based on the facts and evidence presented.

The Court erred in not allowing the case to go to the Jury since there was a volume of conflicting evidence offered by the plaintiff and his witnesses and the defendant, as a matter of law, which should have been decided by the Jury and not the Court.

Appellant's narrative argument in part one of this brief spelled out in detail each conflicting point in the testimony offered by both sides. Appellant feels that the balance of evidence, true and uncontradicted, was sufficient for a jury to decide the issues involved.

Mrs. Barnhard in her testimony besides stating that she saw her husband's incision on the day he returned from the hospital(p.) also testified to the fact that she saw the stitches in the incision ( ) and the stitches were removed when she went with her husband to the doctor's office, "about three days later." (p. .)

Testifying about her husband's cough prior to the operation, Mrs. Barnhard stated, "Well, it was a very severe cough. He coughed so you would think he was going to break apart somewhere. And he would cough, oh, it would hurt your ears."

The witness also testified that when she visited her husband in the hospital that he still had the cough....." * * * and it was bad enough, a bad cough. He always had it. I didn't stop to think if it was better or worse."

Questioned as to her own observations of her husband's suffering as a result of the operation, she replied, " He seems to be in constant pain. He feels he must wear a binder, and when he takes it off he doesn't feel as good, and he usually goes to bed early and lays down when he takes the binder off, the metal support he wears. * * * He can't lift things the way he did."

After describing her husband's disabilities as a result of the hernia she continued, " Before that, he was sort of a man who could think of all sorts of things to do to earn a living , if things were rough. But since the hernia, he couldn't go back to his old job. * * * He was going into a business; but he would have to lift a lot of eggs in egg cases, and he couldn't do that afterwards. All he can do is be a cab driver."

Q. Does he do a full day's work.

A. No, he doesn't. (p.)

Mrs. Barnhard then testified that during their married life she had occasion to observe her husband's body, (p.) and that he had little red marks by his neck (p.) and some scars on his knee that didn't heal and one on his elbow that didn't heal.(p.)

This testimony was in accord with what the plaintiff said about his own condition.

Dr. Cutting, in testifying what was done as far as pre-operative treatment went for the plaintiff, noted that he ordered a [illegible] (p.)

Yet, from the records in his possession, the doctor well knew that Mr. Bernhard needed a special diet.

Here again is an instance of neglect in pre-operative care and does it not manifest itself more when the doctor admits that after the third visit by the plaintiff that he sent him to his family doctor for a special diet and treatment for his liver ? ([illegible] P. [illegible])... "To go back(to his family doctor)and go on his diet, for his liver disease, yes."

The appellant in the instant case has tried to bring out in his argument, by means of comparison, wherever possible, the different situations surrounding the case, and thus letting the testimony and evidence carry the cause forward to show that the trial court erred in refusing to let the jury decide this case. Appellant maintains there was sufficient evidence as a matter of law, for a jury to determine who was right and who was wrong in Bernhard v Gaffney.

In Catholic University v. Waggaman, 32 App. D.C. 307, 320, the Court noted, "The Courts of review in this Country are applying with increased strictness the rules limiting the right of the trial judge to invade the province of the jury * * * The rule more generally followed is that 'it is only where all reasonable men can draw but one inference from the undisputed facts that the question to be determined is one of law for the Court.'"

In the Grant v White case, 62 App. D.C. 269, 271, 66 F 2d 773, Judge Hitz ruled that "While no presumption of want of skill or care ordinarily arises from the fact that professional treatment was unsuccessful, in this case there was more than that * * * and while the failure of the operation alone creates no presumption of lack of skill or care, it is a circumstance entitled to some consideration, when coupled with other testimony."

Appellant submits that circumstances surrounding the operation and the results are worthy and should have been worthy of some consideration by the trial judge because other testimony tended to show, beyond a shadow of a doubt, that the defendant was guilty of negligence, negligent conduct and malpractice.

The question as to whether or not the defendant used the proper standard of skill and care necessary in his use and post operative treatment, in light of the evidence presented that the defendant abandoned the plaintiff after discovering that an instrument, herein had developed after the defendant had operated on the plaintiff, was a question for the jury and not the Court.

The evidence presented by the plaintiff in part one of this brief, coupled with the defendant's own testimony as to his conduct, his theories, his practices, his reports, all speak for themselves in proving conclusively that he did not use the proper standard of skill and care in the instant case to free himself of any charge of negligence, negligent conduct and/ or culpability. Appellant maintains that a jury should have weighed the evidence and facts presented by both sides on this issue.

Again, appellant cites the Christie v Callahan case, urges for his theory, and prays this Honorable to rule in his favor by reversing this cause to the courts below for a rehearing and dismissing the judgment rendered in favor of the defendant below.

In Rabenhorst v Smith, 72 App D.C. 343, 347, 114 F 2d 494, the court said, "The doctrine of res ipso loquitur is presumably applied when the facts which the plaintiff proves are sufficient to sustain an inference of negligence, altho evidence directly establishing the negligent act is not available." (citing cases.)

The per curiam opinion handed down in Bruce v Eastern Dispensary, etc., 78 App. D.C. 42, 43, 136 F 2d 276, ruled that, "Unquestionably only experts are qualified to express an intelligent opinion as to what constitutes the proper method of treatment" * * * But that such evidence should be accepted in exclusion of other evidence of conditions and results is contrary to the applicable rule in this jurisdiction and elsewhere. As was said in Campbell v Shelsby, 119 Wash 573, 205 P. 1079, 1081, 'the proposition that experts alone are qualified to testify as to the manner of treatment is 'sound only when soundly applied' and that there must be, in the nature of things, many instances where the facts alone prove the negligence, and where it is unnecessary to have the opinions of persons skilled in the particular science to show unskillful and negligent treatment.'"

Judge Hitz, citing Sweeney v Erving, 35 App. D.C. 62, 43 L.R.A. (NS) 37¼ continued, "There are exceptional cases where the result of an operation performed, if unexplained, may warrant an inference of negligence."

Under that rule, appellant prays this Honorable Court to determine that his case was an exceptional one and the results of the operation, were not explained satisfactorily, and therefore an inference of negligence was present and the evidence offered, should have been submitted to a jury.

Appellant submits that the ruling case law, as laid down by Judge Hitz should be applied here too. Consolidating his remarks by citing the Crist and Cunning cases(supra) the Judge said, "Whether the result of the operation, without other evidence would have brought it within the exception, we are not called upon to say, because there was other evidence tending to the same conclusion and we are of the opinion that the order directing the verdict for the defendant was erroneous and that the judgment entered thereupon must be reversed."

We too, the appellant in the instant case, pray this Honorable Court to apply that same ruling now because of the evidence and facts presented at the trial in the lower court.

In [illegible], 63 App. D.C. 398, 399, 73 F 2d 318, the Court, per curiam stated, "We think the present case presented a question of fact for the jury as to whether or not the defendant was negligent in the treatment of the case and thereby caused Plaintiff's injury."

That too, is the thinking of the appellant here, and he prays that this Court rule likewise.

In the C and P Telephone Co v [illegible], 69 App. D.C., 326, 101 F 2nd 424 Chief Judge Edgerton ruled that'a jury is entitled to believe the plaintiff's testimony though contradicted by defendant's testimony.' However, in the instant case, the lower court did not give the jury a chance to decide who was telling the truth. Further, in the [illegible], 70 App. D.C. 354, 107 F 2d 627, the cardinal principle of law laid down by the Court was that 'on a motion to dismiss, the plaintiffs' allegations must be assumed to be true." Your appellant here maintains under his set of circumstances, if the judge assumed that his allegations were true, and they were,——he should have given the case to the jury.

Appellant put on his only expert witness, the registered nurse who testified to what she saw and what she knew in her particular field. Appellant contends this testimony as to what the defendant didn't do and what he should have done , was soundly applied and was strong enough to give the jury cause to decide the entire case, and not have the Court agree to a directed verdict for the defendant.

Justice Miller, in Stone v Stone, 78 App. D.C. 5, 136 F 2d 761, speaking for the Court said, "In this case there was positive testimony, uncontradicted and not inherently improbable. Neither a judge or a jury is at liberty to disregard such evidence. "(citing cases.)

Appellant contends that the positive testimony, uncontroverted and unchallenged was of such strength that the judge should not have ignored it nor should it have disregarded same.

The Court in the Stone case, supra, continued, "Where all of the testimony is one way, and is not immaterial, irrelevant, improbable, inconsistent, contradicted or discredited, such testimony cannot be disregarded or ignored by a judge or jury, and if one or the other makes a finding which is contrary to such evidence, or which is not supported by it, an error results for which the verdict or decision , if reviewable, must be set aside. To hold otherwise would vest in the triers of facts in cases subject to review with authority to disregard the rules of evidence which safeguard the liberty and estate of the citizen."

Your appellant pleads that this type of law be applied in his case, in light of the evidence and testimony presented and as set forth in part one of this brief.

Appellant contends that the doctor was aware that nature alone was not going to heal this hernia which the doctor caused and when he abandoned the plaintiff, it was nothing short of negligence, negligent conduct and malpractice. The defendant's reason for not doing anything about the hernia is without foundation, and is not an excuse for his conduct. He knew the consequences of such an operation as he performed on the plaintiff, because he knew what the condition and history of the patient was, but we contend he chose to ignore them. The testimony as to the skill and care was conflicting and in [illegible] v. Hildebrand 81 U.S. APP. D.C. 368, 159 F 2d 25, the court stated,--" * *

" * * * but the jury was entitled to determine the truth between the two witnesses." ----and your appellant therefore contends that if the jury was entitled to determine the truthfullness between Dr. Gaffney and Mr. Burnhard, his wife and the nurse, and by doing so, accepted the plaintiff's version in this case, some ground would have been established to justify the jury in reaching the conclusion that the proximate cause of the plaintiff's hernia was the improper pre and post operative care and the negligent treatment of the wound resulting from the useless operation. Yes, it was useless since the doctor admitted that he did not find any of the conditions he was looking for. If he insisted that he did find a "new" condition, namely a fatty metamorphosis , he surely did nothing to correct it or even suggest any corrective measures. If that is what Doctor Gaffney considers the proper degree of skill and care in the treatment afforded Mr. Burnhard, I am sure this Honorable Court will not agree with him.

In Hing Lee v Sullivan, 88 U.S. App. D.C. 104, 106, 187 F 2d 82, Judge Washington decided that "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it is usually complied with or not."

Appellant claims that if this theory of law was applied by the trial court, his case would have been submitted to the jury without question. And as an extra, added bulwark to the plaintiff's case, he asks that this Honorable Court follow its own decision in the Hitaffer v Argonne Co case, 87 U.S. App. D.C., 57, 61, 183 F 2d 811, which decided that, "In the first place, we are committed to the rule in negligence cases that where in natural and continual sequence, unbroken by any intervening cause, an injury is produced, which, but for the negligent act would not have occurred, the wrongdoer will be liable." (citing Howard v Swagart, 1947, 82 U.S. App. D.C. 147, 161F 2d 651, S.S. Kresge v Kenney, 1936, 66 App DC 274, 86 F 2d 651.). In that case(Hitaffer) the court concluded, " * * * and it makes no difference whether or not that particular result was foreseeable."

These cases are exactly in point with your appellant's cause and he prays that he be given the right to have his case determined by the trier of facts....the jury, and not the judge. He earnestly asks that this Honorable

Court apply the decisions of the cases cited heretofore as well as the rule laid down by Judge Fahy in the U.S. v Murray case, 87 App. D.C. 84, 86, 182 F 2d 986, wherein the court decided that," * we think properly, that one is accountable not only according to what one actually sees or does, but also in the light of what one should see or do in the exercise of ordinary care."

The plaintiff below entrusted himself unto Dr. Gaffney and feels that the doctor should be held accountable not only for what he saw and did but for what he ignored and failed to do not in the exercise of just ordinary care, but in the exercise of special care which he owed to the plaintiff.

The plaintiff, suffering from a number of ailments had another one added to the list when the doctor failed to exercise the proper degree of skill and care due the plaintiff and believes that the jury had the right to determine what the physical results were and whose fault it was as a result of the operation performed on the plaintiff. The judge erred in taking this case away from the jury.

In Shaw v De Marco et al, 91 App. D.C. 257, 260, 199 F 2d 777, Judge Miller stated, " The plaintiff had the right to show the physical results of the fact that the injury suffered in the accident aggravated a pre-existing but dormant (pituitary) defect."

In the instant case now before this Honorable Court, we believe such a situation is in line with our cause, and not only should the Court have allowed the plaintiff to show the physical results (which he did) but the Court should have gone further and allowed the jury to determine if the Dr. Gaffney was the cause of the injury suffered as a result of the operation, and further, if he used the necessary degree of skill and care in light of the evidence presented .

The Court erred, as a matter of law, by making evidentiary rulings, much to the prejudice of the plaintiff, and in doing so, abused its judicial discretion, beyond the point, where, no matter what evidence would have been presented, the verdict entered, would have been the same.

(App. p. 1)

During the trial, at Page 5 of the transcript, the Court, interrupted the questioning of the plaintiff by his counsel three times while counsel was framing an important part of the background to show that the defendant did not take proper pre-operative precautions.

THE COURT. I don't think we need to go into that, unless you can some reason why it is relevant. * * * * *

THE COURT. Very well, make it brief and just confine yourself to whatever is possibly relevant.* * * * *

THE COURT. That is immaterial. If you want to bring out some condition he suffered from, bring it right out. * * * *

THE COURT. No, no. I am not going to go into all that. We have to confine this case, like all other cases, to the issues in the case. If you want to bring out that he had some condition that the defendant should have known of, on January 7, 1958, you can bring that out. But I am not going to go into the details of his prior hospitalizations. * * * *

THE COURT. What do you want to bring out ?

MR. SMITH. I want to bring out the first that they took quite a bit of time consulting the men to determine that his illness was, and how long it took, in comparison ---

THE COURT. Oh no. I will exclude that. I will exclude that completely. I thought you wanted to show he was suffering from some particular condition.

MR. SMITH. That is what I am going to do. * * * * *

( ) THE COURT. But not the other matter you mention. We have got to move along fast.

The court from time to time thereafter would interrupt counsel for appellant criticizing the manner in which a question was asked or disallowing the question entirely when in fact it was most important to be brought out for the benefit of the plaintiff and the jury. When plaintiff was questioned the second time about a situation, for example, the court interrupted saying, "We have had that once before. Please don't repeat, Mr. Stumpf. Proceed to something else. ( ) * * * But please don't go over the same ground more than once, Mr. Stumpf. There is no time for repetition." ( )

Plaintiff contends that the Court interfered with his right to do everything in his power to legally prove his case by asking those questions.

When plaintiff was asked, (App. p. 6)...how much earnings have you lost as a result of this disability, caused by the hernia ? The Court interrupted to state, "I think that is a question for the jury to determine."

But alas, did the jury have this question to determine ? We say, no!

The appellant gave a resume of what he lost as a result of the hernia caused, we say by the doctor's negligence and negligent conduct and it was not objected to, but the jury never was able to receive the question.

On page 34 (App. p. 6) of the transcript the Court stated:- "The evidence indicates that he retired before the operation, and he retired for disability consisting of cirrhosis of the liver. That has nothing to do with the disability here in question. I think that your question calls for a conclusion and it is a matter for the jury to pass on. * * *

True, it was a matter for the jury to pass on because later on, the plaintiff testified that even after it was determined through the operation that he did not have cirrhosis of the liver, he could not be taken back by the Civil Service Commission because of the incisional hernia. (Emphasis supplied by appellant.) (App. p. 6)

Questioned by his own counsel concerning what amount of earnings he lost from particular day until the "present day" (App. p. 6) counsel for the defense objected to the question and the court sustained the objection, noting, * * * You have the facts here, and the jury will have to draw their conclusion, not the witness."

Yes, the court stated three times, during the examination of the plaintiff, that the jury would have to decide certain issues, but the record speaks for itself. The jury was never given the opportunity to do so.

The comments made by the Court while the nurse was testifying are already part of this record and will not be repeated, but suffice to say, in making the comments the Court had already made up its mind just by noting the language he used. (Tr . p. 49, 50, 51,52,53,55,57, 58,). (App. p. 9,10)

Plaintiff contends that upon the record of this case, this Court can find ample reason, basis and foundation, both infact and in law, to decide that the court below indulged in abuse of discretion to the detriment of said plaintiff.

"Abuse of discretion" may be defined as an exercise of discretion to an end or purpose not justified by, and clearly against reason and evidence. Grant v Richards, 84 Mont. 432, 23 P 2d. 266. Turner v State, 142 Okla 278,287

P. 783. (Cited in note, Interna. Small Loan v. Miles, (Sup.Ct of App.) 34 A 2 ed., 609, 71 W L B 1273, 1277. "Judicial power is never exercised for the purpose of giving effect to the will of a judge; always for the purpose of giving effect to the will of the law." Osborn v U.S. Bank, 22 U.S. 738, 866. "If it serves to delay or defeat justice it may well be deemed an abuse of discretion." Hill v. Henderson, 132 Mo. 459.

Abuse of discretion- Judicial Power. "Judicial power, as contradistinguished from the power of the law, has no existence. Courts are the mere instruments of the law and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when this is discerned, it is the duty of the Court to follow it. Judicial purpose is never exercised to give effect to the will of the judge, always for the purpose of giving effect to the will of the legislature, or in other words, the will of the law." Osborn v United States Bank, supra.

Conclusion

In conclusion, it is respectfully submitted that in view of the foregoing authorities and arguments and for the reasons heretofore stated, the trial court erred in granting the motion of the defendant for a directed verdict in this case.

Therefore, the verdict and judgment below should be reversed, and plaintiff herein granted a new trial. That the plaintiff should be granted a new trial with instructions accordingly, as this court should see fit to direct to the court below.

Respectfully submitted,

I. William Shangold
1128 Vermont Building
Washington 4, D.C.

Attorney and counsel for Appellant.

APPENDIX

1

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ARTHUR THEODORE BERNHARD ;
4401 Covington Street, SE ;
Washington, D.C. ;
Plaintiff ;
v ; Civil action No. 2679-53 Filed Jan 4, 1955
Dr. Leo B Gaffney ; Harry M Hull, Clerk
5009 Tilden Street NW ;
Washington, D.C. ;
and ;
Providence Hospital ;
Defendant(s) ;

AMENDED COMPLAINT FOR DAMAGES

1. This Court has jurisdiction, as the amounts involved exceed $3,000.

2. The plaintiff on or about January 7, 1952, did engage the defendant Dr. Leo B. Gaffney, a licensed physician and surgeon in the District of Columbia, for a consideration, to perform an exploratory operation on his person in connection with a liver condition of the Plaintiff.

3. The defendant, Dr. Leo B. Gaffney, performed said operation at the hospital of the defendant, the Providence Hospital, in the District of Columbia on or about January 7, 1952.

4. The defendants were negligent and/or incompetent in performing the operation, suturing the incision, and in giving or failing to give pre-operative and post-operative treatments and advice.

5. As a result of said negligence and/or incompetence, plaintiff developed an incisional hernia in the upper, center portion of his abdomen, which has caused plaintiff to lose approximately $4,000.00 in earnings and in all probability will cause him to lose earnings in the future of approximately $50,000.00; to incur great medical expense and in all probability will cause plaintiff to undergo another operation in the future at great expense to the plaintiff; to experience great pain, suffering, and mental anguish, and in all probability will continue to do so for the remainder of the plaintiff's life; and to be permanently disfigured and disabled.

WHEREFORE, the plaintiff, Arthur Theodore Bernhard, demands judgment against the defendants for damages in the amount of $150,000.00 plus costs.

A JURY TRIAL IS DEMANDED.

/s/ RAYMOND L. POSTON
Raymond L. Poston, Jr.
Attorney for Plaintiff
720 Transportation Building
Washington 6, D.C. Nat 8565

ANSWER TO COMPLAINT FOR DAMAGES

II

The defendant Dr. Leo B. Caffrey, by his attorneys, Welch, Daily and Welch, for answer to the complaint, says as follows:

FIRST DEFENSE:-The Complaint fails to state a claim against defendant upon which relief may be granted.

SECOND DEFENSE:- Defendant admits the allegations in Paragraphs (2) and (3); denies the allegations in Paragraph (4) and denies the allegations in Paragraph (5) except the portion which refers to loss, pain and suffering, etc. and which defendant is without information sufficient to form a belief as to the truth of the allegations. Defendant denies each and every other allegation not herein specifically admitted.

THIRD DEFENSE:-Defendant's treatment and care of the plaintiff was in accord with the approved practice of other surgeons practicing in the District of Columbia and while it is true that an incisional hernia developed post-operatively on January 28, 1952, it was through no fault of the defendant. Plaintiff negligently failed to return for observation and treatment as directed.

WELCH, DAILY AND WELCH

BY /s/ John M Daily
Attorneys for defendant

certificate of service

PRE-TRIAL PROCEEDINGS FILED APRIL 5, 1955

STATEMENT OF NATURE OF CASE April 5, 1955

This is an action for negligence by the pltf. for injuries resulting from an operation by deft Dr. Leo B. Caffrey, also negligence on the part of Providence Hospital. As a result of said negligence, pltf. claims he developed an incisional hernia in the upper center of his abdomen. Pltf. claims that operation was on advice of deft Doctor and that such operation was in fact unnecessary; that the deft. doctor failed to cause necessary preliminary tests, especially a Wasserman test.

That the deft. doctor was negligent in that he did not use the operational technique proper for the pltf. type of patient and that the suturing was done by cat gut instead of by silk thread. Pltf. further contends that pltf. was discharged prematurely on the doctor's order; that said deft. doctor abandoned pltf. by discharging him from his care and treatment without advising him that an incisional hernia existed and failed to provide pltf. with the binder or to advise him the use of the same.

All of said acts of negligence being at variance with the recognized medical practice in this district. Pltf. claims deft. Hospital was negligent in not making Wasserman test; failing to provide Pltf. with a binder and advising pltf. as to the use of same.

Injuries-permanent: Protrusion of abdomen which is unsightly and hinders pltf in his movement; that this can only be corrected by a further operation.

Special Damages: Belt and truss-$110.00 No claim for hospital or medical exp. Loss of earnings from 3/1/52 to 4/5/55 at rate of $3365 per yr less $2200.00 Correction of present permanent injury claimed may be made by operation est. to cost. $300.00

III

Pltf also contends that loss of earnings will continue in the indefinite future.

Dft. doctor denies negligence and states that treatment and care of the pltf. was in accord with the approved practice of other surgeons practicing in D.C. Dft. doctor further claims that pltf negligently failed to return for observation and treatment, as directed by daft doctor.

(Providence hospital defenses omitted)

Stipulations: Hospital records, Providence and Perry Point be received without formal proof subject to objection of relevancy and competency. Further stipulated that Dr. Gaffneys personal records covering pltf will be made available by dft. doctor.

/s/ R.B. Keech
Pretrial justice

Dated 4/5/55

signed by attorneys authorized to act.

VERDICT AND JUDGMENT

List of ~~Jurors~~ * * *who, after having been duly sworn to well and truly try the issues between Arthur Theodore Bernhard, plaintiff and Dr. Leo B. Gaffney, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 6th day of December, 1955, that they find for the defendant against the plaintiff, by direction of the Court.

Wherefore, it is adjudged that the said plaintiff take nothing by this action, that said defendant go hereafter without day, be for nothing held and recover of plaintiff his costs of defense, by direction of this court.

Harry M Hull, Clerk
By John F Burke, Deputy Clerk

By direction of
Judge Alexander Holtzoff

NOTICE OF APPEAL

FILED JAN 5,

1956.

to the United States Court of Appeals for the District of Columbia from the judgement entered on the 6th day of December, 1955 in favor of defendant~~s~~ Dr. Leo B Gaffney against the said Arthur T. Bernhard.

/s/ I. William Stempil
counsel for plaintiff-appellant
address of record

Tr. p.5 THE COURT: I don't think we need go into that, unless you see some reason why it is relevant. * * * What is the relevancy ?

MR. SEIDEL. The evidence that the witness will give regarding his condition, which Dr. Caffrey needed for some of his pre-operative tests.

THE COURT. Very well, make it brief and just confine yourself to whatever is precisely relevant. * * * * * That is immaterial. If you want to bring out some condition he suffered from, bring it right out. * * *

Tr p.6 THE COURT. No, no. I am not going to go into all that. We have to co fine this case, like all others, to the issue in the case. If you want to bring out that he had some condition that the defendant should have known of, on January 7, 1932, you can bring that out. But I am not going to go into the details of his prior hospitalizations. * * * * Oh, no. I will exclude that completely. I thought you wanted to show he was suffering from some particular condition - * * * at the time he went to Dr. Caffrey. That you are allowed to show.

Tr. p. 7 THE COURT. But not the other matter you mention. We have to move along fast.

BY MR. SEIDEL. What did the hospital find wrong with you at Perry Point. A. (By Mr. Barnhart.) That I had cirrhosis of the liver.

Q. Anything else ? A. And that I was obese. And I never knew until later, but that there was a positive Wassermann test, denoting that I had syphilis.

Q. Active, or -- A. I am not a doctor. That I couldn't say.

Q. How long did you stay at Perry Point?

THE COURT. No.

MR. SEIDEL. I am sorry. I withdraw the question.

THE COURT. You have shown this condition. * * *We are going to omit all that. * * * * Are you going to claim any other condition besides these three.

MR. SEIDEL. Yes, your honor.

Tr. p. 9 THE REPORTER, (reading) "That prior to going to Dr. Caffrey, he had abdominal pain, and general weakness; he had an enlarged liver;

Tr. p.9 cont. ....that he had some sugar in his system; that he had some constriction in his upper or descending colon; that he was given certain diets.

Tr. p. 11. (Mr. Bernhard.) A. I told him how I felt and what my conditions were, to the best of my ability. * * * I told him I was bloated and I felt like I was going to explode. I told him I had an ulcer on my foot. I told him I had been to Perry Point and they told me I had cirrhosis of the liver.

Tr. p. 12 . Q. What did he tell you after the examination was over ?

A.- That I should call him in about a week; that after he studied the reports from Perry Point and had consulted with my family doctor, he would let me know if he would operate on me.

Tr. p. 13 - Q . Immediately prior to your operation, and during your visit to Dr. Caffrey, the one visit to Dr. Caffrey, did you give him any information with reference to any coughing, or did he notice or say anything to you ?

A. Yes, sir. I told the doctor I had a very bad cough, and he told me to cut down on my smoking. At that time, I was smoking about two packs of cigarettes a day. So I cut it down until I was smoking less than half.

Q. Did he ask you how long you had the cough ? A. No, sir.

Tr. p. 17 Q. Were the stitches in that incision removed while you were at the hospital. A. Positively not.

Q. You had an incision ? A. Yes, sir.

Q. How was this incision supported when you left the hospital ?

A. It had some gauze over the incision, and some adhesive tape going cross wise.

Q. Did you see the incision at any time ? A. Yes, sir.

Tr. p. 18. Q. Did Dr. Caffrey, after he discharged you from the hospital advise you to wear a binder to support this incision ? A. No, sir.

Q. Did Dr. Caffrey at any time give you specific instructions and advise you how to conduct yourself to prevent the breaking open of this wound from developing in the area of the incision ? A. No, sir.

Tr. p. 19. Q. After your release from the hospital, where did you go ?

A. I had some relatives take me home.

Q. What steps were taken to help you get back to so-called good health, after you left the hospital, by yourself or any body ?

Tr. p. 19 cont. A. My family wouldn't let me lift anything or do anything. I just sat around and looked at the television. I had a good diet. And it was only going to be three days before I was supposed to go back to Dr. Gaffney's office.

Q. When you say you had a good diet, who prescribed that diet ?

A. The doctors at Rocky Point.

Q. Did Dr. Gaffney give you an information with reference to you diet ? A. No, sir.

Q. You said you went back to Dr. Gaffney, or were supposed to go back to Dr. Gaffney, in three days ? A. Yes, sir.

Tr. p. 20. Q. What day was that ? A. January 18, ~~xxx~~ 1952. ~~xxxx~~ I went to Dr. Gaffney's office.

Q. What transpired at this visit ? A. Well, the doctor took took my dressing off and he took a pair of blunt scissors and stuck it into me and let some fluid out of me. He took the stitches out.

Q. Was that the first time he took the stitches out ? A. Yes, sir.

Q. Dr. Gaffney, you testified just previously, did not take the stitches out at the hospital. A. No, sir.

THE COURT. We have had that once before. Please don't repeat, Mr. Stampfl. Proceed to something else.

MR. STAMPFL. What else did he do after he took the stitches out ?

A. He put another bandage on and told me to come back in five days.

Q. Did you go back in five days ? A. I did (Tr. p. 21)

Tr. p. 21 Q. What did he do then ? A. He took the bandage off, and felt me all over, or around the incision, and put another bandage on and told me to come back in another four or five days.

Q. Did you come back in another four or five days ? A. I did.

Q. What happened then ? A. The same thing the second time. He took the bandage off and probed it as I guess that is what they call it--put his fingers into me; and put another dressing on it. And I said, "When shall I come back ?" And he said, "You don't need to come back." And I said, "Shall I go to my own doctor and get treated for my liver ?" And he said, "Yes." * * * * * That is all.

Tr. p 21 Q. Try and recall, Mr. Bernhard. Did he say anything to you concerning an incisional hernia at that time ?

A. Positively, not.

Q. Did there ever come a time that you learned that you had an incisional hernia ? A. Yes, sir.

Q. When ? A. (Tr. page 22.)

Tr. p. 22. A. Oh, it was a matter of, well, within the next few days. I don't know the exact date. I went back to my family doctor for liver treatment, and he informed me that I had an incisional hernia. * * * * * * * *

Q. You knew after the third office visit to Dr. Caffrey, that you had an incisional hernia ? A. No, sir.

Q. I will request the question. Perhaps I used the wrong language. Did you learn, after the third visit to Dr. Caffrey, that you had an incisional hernia ? A. Yes, but not from Dr. Caffrey.

Q. All right. What did you do as a result of finding out that you had an incisional hernia ? A. I got an abdominal belt.

Q. Who told you to get an abdominal belt ?

MR. BAILEY. I object,your Honor , please.

THE COURT. Objection sustained. What someone

Tr. p.23 other than the defendant told this witness is not admissible. Anything the defendant said of course is admissible.

BY MR. SKOPIL: You testified that you went to your family doctor, at the suggestion of Dr. Caffrey, after the third visit. A. Yes, sir.

Q. So that you would be treated for your liver. A. Yes, sir.

MR. BAILEY. If your honor, please, I didn't understand that to be his testimony. He said he went there for treatment of his liver, not that Dr. Caffrey told him.

THE COURT. The testimony was, as the Court recalls it--and the jury's recollection is what governs--that the witness asked Dr. Caffrey if he should go to the hospital for treatment of his liver; and the doctor said yes.

MR. SKOPIL. Go to his family doctor.

THE COURT. But please don't go over the same ground more than once, Mr. Skopil. There is no time for repitition.

Tr. p. 29 A. I applied for a hacker's license in the District of Columbia. * * * That was the latter part of March or the first of April. The license was issued * * * * in 1972. The license was issued as of April 30, 1972.

Q. When you made your application for the license, did you fulfill at that time, all of the requirements ? A. No, sir.

Q. What was the difficulty ? A. Well, after the doctor examined me, he said I had --

A. Wait just a moment. You said after the doctor examined you. Is there a doctor's examination necessary to secure it ? A. Yes, sir. You have to have a physical examination. First you have to pass a written test, and then you are given a physical examination. And the doctor turned me down because I had a positive syphilis test, which was the first time I knew I had anything like that. * * * *

Tr. [illegible] 30 * * * It was sometime during the month of April.

THE COURT. What kind of a test did you take, sir ?

THE WITNESS. A Wassermann test for syphilis.

BY MR. SCHEFFEL. Did you say a positive syphilis test ? A. That is what the doctor said.

Q. How did he arrive at that conclusion, to tell you that?

MR. BAILEY. I object to that, if your Honor, please.

THE COURT. Objection sustained. He assume he made the usual test. Otherwise he would not have reached his conclusion.

MR. SCHEFFEL. Were you finally licensed to drive a taxicab ?

A. After treatment , I was licensed * * * * I think it was eight days I was receiving five million units of penicillin.

Tr. P. 32. Q. Are you still driving a taxicab ?

Tr. [illegible] A. Part time; yes, sir.

Q. What do you mean part time ? Do you have any other work ?

A. No, sir; I am unable to work a full day. * * * Well, I become tired and I have a great pain in my abdomen, and I go home and lie down. * * * * Q. Based on your earnings of the last employment, which was Engineering Research—is that correct ? A. Yes, sir.

Tr. p. 33 Q. -- how much earnings have you lost as a result of this
ctd. disability, caused by the hernia ?

THE COURT. I think that is a question for the jury to determine. Which disability do you refer to ?

Tr. p. 34 MR. SCHMIDT. Of the incisional hernia.

THE COURT. The evidence indicates that he retired before this operation, and he retired for disability consisting of cirrhosis of the liver. That has nothing to do with the disability here in question. I think your question calls for a conclusion, and it is a matter for the jury to pass on. I will sustain the objection.

Tr. page 35 Q. If in your own mind your health was good, since you left the employment of Engineering Research, how much do you estimate you have lost in earnings from that day until the present day ?

MR. DAILEY: I object to that, if your Honor please.

THE COURT. Objection sustained. You have the facts here, and the jury will have to draw their conclusion, not the witness.

Tr. p. 39 Q. Has this incisional hernia caused you any physical pain ?

A. A great deal. * * * I have a great deal of pain through my abdomen, through here. I have to wear a belt, and when I bend over or attempt to bend over, the belt digs into me and causes me to get sore, and an infection.

Q. Has this caused you any mental pain and anguish ? A. A great deal. * * * Well, I feel that I could still hold a job, and if I could pass a physical examination. Again I was told at the hospital, right after the operation, that I did not have cirrhosis; and if I did not have cirrhosis, I could have demanded reinstatement from the Government because I was a permanent employee with permanent status. And when I inquired at the Civil Service Commission if I could be passed with an incisional hernia, I was answered, no. So if I can't be passed, I couldn't get a job in Government again. And that is about all there is around here.

Tr. p. 40. Q. Mr. Bernhard, at any time from the time you were discharged from the hospital by Dr. Gaffney, did he ever tell you that you had an incisional hernia ? A. No, sir.

Q. From your own knowledge, did you have an incisional hernia prior to going to Dr. Gaffney ? A. No, sir.

Tr. page 40

CROSS EXAMINATION

BY MR. DAIX:

Q. The first knowledge you had of any position test was when you took your examination for the cab ? Is that correct. ?

Tr. page 41 A. Yes, sir. * * * * * * * * * * * * * * * * *

Q. And what is the name of that doctor ? A. Dr. John J. Calhoun.

Q. And he did advise you that there was an incisional hernia, I believe ? A. Yes, sir.

Q. And after that advice, did you ever call Dr. Gaffney or go back to him ? A. No, sir. I was very hurt.

Tr. p. 42 Mrs. Christopherson. State your full name. A. Mary Melinda Christopherson .

Tr. page 45 Q. What is your occupation ? A. Registered nurse.

THE COURT. Will the qualifications of the witness be admitted ?

Tr. p 47. MR. DAIX: Her qualifications as a nurse.

THE COURT. Then you don't have to go into detail. The other side will admit her qualifications.

BY MR. DAIX. Q. During your nursing career, did you have occasion to be assigned to operating rooms ? A. Yes, under four years.

Tr. p. 48. Q. Do you know the plaintiff in this case, Mr. Bernhard ? A. Yes. * * * My husband is about a fourth cousin to his wife.

Q. Directing your attention to the first part of 1952, did you know that Mr. Bernhard was in the hospital ? Yes. * * * I saw him the day he came home.

Q. What was his condition, from your own opinion at that time ?

A. Well, he had a very hard cough, and I got a binder and put on him to try and help support his incision.

Q. Then you knew from your own knowledge that he had been in the hospital and had been operated on ? A. Yes.

Q. Did he show you the incision ? Yes.

Q. Did he have a bandage on, supporting the incision, at that time ?

A. Well, he had a bandage, but I wouldn't say it was --

Mr. J
22 THE WITNESS:- I wouldn't it was a supporting bandage.

Q. In your opinion then, was the bandage sufficient to support the incision ? A. Not ---

MR. BAIN. I object to that, your Honor please.

THE COURT. On what ground ?

MR. BAIN. On the ground that they are using a nurse here in an apparent attempt to testify as an expert as against the procedures of the doctor.

THE COURT. I think a nurse can express an opinion as to whether a particular bandage was sufficient to support an incision. I will allow the question. Of course there are a great many things that would be beyond the expert capacity of a nurse to testify to; but this question I think is within the purview of a nurse.

THE WITNESS. It was not a supporting bandage.

Q. Did you make any recommendations to Mr. Bernhard ?

Mr. J 22 A. Yes, to get a tight binder on himself.

MR. BAIN. I object to that, if your Honor please.

THE COURT. Objection sustained, as to what she recommended to the defendant. (?) After all, there are specific limitations on the capacity of a nurse to act as an expert in medical matters.

MR. BENETT. I would like to take an exception to that, your Honor.

THE COURT. Yes, you may note an exception.

BY MR. BENETT. Q.-From your experience in hospitals and in the operating room, is it the practice for surgeons and hospitals to provide binders after such an operation on such a person as Mr. Bernhard ?

MR. BAIN. I object , if your Honor please.

THE COURT. I think if she knows what the practice is and if she has been around operating rooms, she may answer. Of course, you have a right to rebut that, because those things may depend upon the particular circumstances of the case. You may cross examine her about that later. I think she is qualified to answer.

THE WITNESS. A. Yes. * * * Well, on a heavy person or on a person with a cough

Tr. p. 71 like Mr. Bernhard had, when you got the patient out of bed, ordinarily you put a tight binder around them in order to give them extra support, particularly with an incision over your diaphragm, which then you ought is going to put pressure against your incision. * * *I was taught that then I was in training, and I have had different doctors to order it for their patients.

Q. What is the purpose of the binder ?

A. To help give the patient better support.

Q. In your opinion, would this binder have prevented Mr. Bernhard from having the intestinal hernia that resulted ?

MR. DAVIS. I object to that, if your Honor please.

THE COURT. Objection sustained. In order to make the record clear, I am sustaining the objection on two grounds. First, I think it is beyond the expert capacity of a person who is not a physician or a surgeon to express an opinion of this kind; and, second, because that is purely speculative. It merely calls for an opinion as what would have happened if something else had been done.

BY MR. SCHMIT. Q That was the first time that you saw this incision ?

A. The day he came home from the hospital. I am not

Tr. p. 72 sure that date it was. It was in the year 1938, I believe.

Q. Are you familiar with procedures in operating rooms ?

THE COURT. You asked her that. * * * Her qualifications as a registered nurse have been accepted. Counsel don't go into that again.

Q. Can you from your own experience tell the Court and jury what you have seen to be the procedure in sewing up a patient who has been subjected to an exploratory operation ? A. Well, ordinarily, they are sewed up in layers, and with a heavy person like Mr. Bernhard, they usually have two or three reinforcing sutures, besides one straight line of your skin sutures on the outside. * * * *

Tr. p. 73 Q. What is the practice you have been following...

THE COURT. The practice she has been following in hospital.

Q. In following the instructions of doctors, what would be the normal sort type of suture that the doctor would call for ?

MR. DAVIS. I object to that, your Honor please.

Tr. 2 THE COURT. I am going to sustain the objection. I think that is a
23 cont. little beyond the purview of this witness.

MR. SCHEPIL. I would like to note an exception.

THE COURT. She can testify that she has observed.

Q. What did you observe would be the doctor's last step or next to the last step in closing up a patient ? * * *

Tr. 2 24 A. Well, next to the last, ordinarily they would close the skin, and then tie over the rubberdam sutures that go down through the other layers. ***********

Tr. 2 25 Q. Is the retention suture of the same material as the final suture material. A. Well, not the same thickness. It could be the same thing.

Q. What do you mean, not the same thickness? A. Well, ordinarily heavy black silk is used for retention sutures. * * *

Q. From your own experience and observation in the operating room, was it a regular and accepted practice to use retention stitches on obese individuals like Mr. Isenhour ? A. Yes.

Q. Or for persons who had coughs ? A. Yes.

Tr. 2 26. Q. When you observed the incision on the day Mr. Isenhour came home, did you see any retention stitches ? A. No.

Q. Did you see any marks that would indicate that retention stitches had been there ? A. No.

Q. Do retentionstitches, after they have been taken out, leave any special markings ? A. For a period of time, yes.

Q. What are these ? A. Well, a scar from anything, there is a small place where that suture has been removed.

Q. Did you notice any such scar or mark on Mr. Isenhour ? A. No.

Tr. 2. 27. Q. Did you ever in your own handwriting prepare a final report prior to the doctor's signing his name to the report ?

THE COURT. I think that is immaterial. I think you should confine yourself questions to this particular case.

Q. From your own experience, is it customary to release a patient from the hospital, after undergoing this type of an operation, within eight days, before the incision has healed and before the stitches have been removed

BY MR. BAIN.

Tr. p 27 I object to that your Honor.

THE COURT. Objection over-ruled.

Q. You may answer. A. I am not sure how it was put. But ordinarily, the stitches are removed when they are discharged from the hospital, when they have been there eight days.

Q. The stitches are removed ? A. Ordinarily all of them are out.

Q. Do you mean the retention stitches and the others ? A. Yes, sir.

Q. Is that what you observed to be the ordinary procedure ? A. Yes.

Tr. page 28 Q. Did you ever assist a doctor in doing that ?

THE COURT. That is immaterial. Please don't do that, Mr. Stumpfl.

* * * * *

Q. Other than an emergency operation, have you ever known of an operation to be performed without blood tests ?

MR. BAIN. I object to that, your Honor.

THE COURT. Objection sustained. I might call your attention to the fact, Mr. Stumpfl, that what this witness has seen in and of itself is not admissible. I have allowed her to testify as to what she knew to be the ordinary practice, which is an entirely different thing. Whether she has seen something or not is incompetent. * * * * * *

Tr. page 29 Q. Did you furnish Mr. Bernhard with a binder ? A. Yes.

CROSS EXAMINATION

* * * * *

BY MR. BAIN

Q. And did he have adhesive tape on the incision at that time ?

A. He had two or three strips of the adhesive, yes.

Q. And that is considered a support, is it not ? A. It depends on how it is applied.

Q. I submit you if adhesive tape is not considered a support.

A. Well, yes.

Q. Did you remove the tape with the binding on that occasion ?

A. No.

Q. Were you able to see the wound without removing the binding and the tape ? A. Mr. Bernhard lifted the gauze out. It was loose, and I could see under it.

Tr. p 61 DIRECT EXAMINATION OF MRS. BERNHARD.(continued)

Q. did he make any complaints to you as to his demeanor, his feelings towards you, the family, himself ? * * * A. Oh, he was worried, naturally. * * ** * * * *

THE COURT. Mr. Stempil, the issue in this case is whether, as a result of the operation, the plaintiff had an incisional hernia, and whether that was caused by something that was negligent on the part of the defendant. So I think you should confine yourself to that issue.

MR. STEMPIL. Your Honor, I need two or three questions to bring it up to that point.

THE COURT. But don't start from a point that is too remote.

Tr. p 63. Q Were you present when your husband was released from the hospital. A. Yes, sir; I was there. * * * *

Q. Did you have an occasion to see your husband's incision right after being released from the hospital and taking him home ? A. Yes. At home he showed it to me. * * * Well, I saw stitches and scars that looked like a turkey or some fowl sewed up and prepared for the oven.

Tr. p 65. Q. Mrs. Bernhard, you said you saw a scar, or scars; or did you see a single scar ? A. Well, a line of scars. I mean and incision going down, and the stitches.

Q. Were the stitches in there ? A. Yes, sir. * * * *

Q. And you say the stitches were there. A. Yes, they were.

Q. You saw them in the house ? A. Yes.

THE COURT. Please don't keep repeating. She said she saw the stitches. That is enough.

Q. Did he have a bandage around the stitches ? A. Yes, he had a bandage. * * * * Well, it was a bandage covering the incision, a wide bandage.

Tr. p. 66. Q. Was there adhesive tape around the wound itself, directly against the skin ? A. I can't remember, I don't believe so. I just don't remember that.

Q. How were you able to see the incision ? A. My husband lifted it up to show it to me--lifted a loose end of the bandage a little, just so I could see what they looked like.

Tr. p 66 Q. Were there any heavier stitches, beyond those that closed the incision ? A. No, sir.

Q. From your own knowledge, do you know when those stitches were removed ? A. They were removed when I went with my husband to the doctor's office.

Tr. p. 67. THE COURT. When ?

A. When I went with my husband to the doctor's office, three days later.

Q. Prior to the time of the operation, di your husband have a cough

A. Yes, sir; he did. ~~was was was~~ Well, it was a very severe cough. He coughed so you would think he was going to break apart somewhere. And he would cough, oh, it would hurt your ears.

Q. Was he wearing a binder around him prior to the operation.

A. No, sir; he was not.

Q. During your husband's stay in the hospital, when you came to visit him every day, was he still coughing ? A. Yes, sir; he coughed.

Q. As bad as he did prior to the operation ? A. Well, I don't know how it compared. It was a cough, and it was bad enough---a bad cough. He always had it. I didn't stop to think whether it was worse or better.

* * * * * * * *

Tr. p. 70. Q. From your own observation, is there any more evidence of suffering as a result of this operation? A. Yes, sir. He seems to be in constant pain. He feels he must use a binder, and when he takes it off he doesn't feel so good, and he usually goes to bed early and lays down then he takes the binder off, the metal support he uses.""He hasn't any rest at all.

Tr. page 71 Q. Are there any disabilities now that he has that he didn't have prior to the operation ? A. He can't lift things the way he did. He naturally more or less could lift things, and for a number of years before, for me. He was always careful not to let me lift ~~thing~~ heavy. But since he has had his hernia, I lift things. * * * *

Q. Has your husband been able to earn the same type

Tr. page 72 of living, or a living, since he developed this hernia ?

A. No sir. Before that, he was a sort of a man who could think sorts of different things to do to earn a living, if things were now

Tr. p. 72 But since the hernia, he couldn't go back to his old job. And he had gotten started in a business where he was, at least he was --He was going into a business; but he would have to lift a lot of eggs in egg cases, and he couldn't do that afterwards. All he can do is be a cab driver.

Q. Does he work a full day. A. No, he doesn't. * * * *

Q. Mrs. Bernhard, during your married life you have had occasion on several occasions to observe your husband's body, haven't you ? A. Yes, sir.

Q. Did you notice any special marks on any part of his body ? A. Oh, he has little red marks sometimes up here. He had

Tr. p 73 * * * by his neck. And he had some sores on his toes that didn't heal and he has some trouble with for a long time. And he had one on his elbow, a sore, that didn't heal.

* * * * * * * *

Q. Prior to your husband's operation ** * * did he have them at the time he went to the hospital ? A. I believe so, I didn't take any special notice.

Q. Does he have them now. A. He has some occasionally. I don't know if they are the same type. I don't pay too much attention to it.

Tr. page 74. Q. The condition of his toes, was that present prior to the operation ? A. Yes, sir. * * * Well, I don't know. I haven't noticed it especially. He always had a little trouble with his toes.

Q. You make mention of the sore, or the --

THE COURT. I don't see the relevancy of all this.

MR. SHAPIL. Oh, your Honor, this is the most important --

THE COURT. Just a moment. Don't interrupt the Court.

MR. SHAPIL. I am sorry.

THE COURT. The issue in this case is whether, as a result of some alleged negligence on the part of the doctor, the plaintiff sustained an incisional hernia; and I think the testimony should be directed to that issue.

MR. SHAPIL. These questions have a very definite bearing, your Honor.

* * * * ** * * * * * * *

Tr. p 78. DIRECT EXAMINATION OF MR. BERNARD. (Recalled)

Q. Mr. Bernhard, from your own observations of your own body, do you have any special markings on any part of your body that are ordinarily not attributed to a man in good health ? A. Yes, sir.

Tr. p. 78 W. What parts of your body ? A. My left elbow, my right foot, and around my neck.

Tr. page 79. Q. What do you have around your neck ? A. Some little red things. They look like small pimples. They never come to ahead. They are little hard substances.

Q. And your elbow ? A. Well, it breaks out and blackhead-scales.

Q. And your toes ?

THE COURT. How does that concern this case.

MR. STENGIL. One of our contentions, Your Honor, is that the doctor did not use the proper pre-operative care. * * * Give the plaintiff special medication prior to the operation, when he knew that positive syphilis was present.

THE COURT. It is admitted that syphilis was present. The defense admits that and also that the doctor has a record of it. What are you trying to show by this witness at this time ? What more do you need?

MR. STENGIL. One more thing. Q. Did Dr. Gaffney discuss the syphilis with you ? A. No, sir.

Q. Did he give you any special medications prior to the operation ?

Tr. p 80. A. No, sir.

DIRECT EXAMINATION OF DR. GAFFNEY

Tr. p 87

Q. (By Mr. Stengil.) Would you tell the Court and the jury what Mr. Bernhard came to you for ? A. Mr. Bernhard came to me because of the following symptoms.* * * The first complaint was a feeling of fullness, and a hard, tender mass in the upper part of his abdomen. He

Tr. p. 88 was had been feeling poorly for past three years. Fullness and nausea occur after meals. He belches a great deal and is tired constantly. Has had a bad taste in the mouth for most of this time. He had had attacks of diarrhea during the past three years. Stools have been clay colored at times. He has gained 24 pounds in the past year. He has had insomnia for the past three years. They were the chief complaints. * * * My examination disclosed a rather obese, short male, not acutely ill. His temperature was 98.6 * * * * Examination of the patient's head revealed that his pupils were equal and reacted to lighting accommodation normally. There was no jaundice of the mucous membrane of the eyes. His nose was normal. He was edentulous, that is, all of his teeth were out. There were no ulcers or sores in the mouth, and the

Tr. p 89 neck, the thyroid is of normal size, and there are no enlarged lymph glands. The heart is of normal size. The sounds are of good quality. There are no murmurs, and the rhythm is normal. The lungs are clear throughout, no rales heard. The abdomen was pendulous. By that I mean it protruded. And there are some superficial veins on the skin of the abdominal wall. There is a hard mass filling the entire upper abdomen, extending down to the level of the navel. It is quite smooth and rather tender.. There is no fluid wave present. That is, I could not detect any fluid in the abdominal cavity. The genital organs were normal. Rectal examination revealed no hemorrhoids or rectal masses. And the prostate gland enlarged about two times the normal size. The extremities are normal, except for slight edema of the ankles.
Tr. p 90. Q. Do your notes indicate any scars on the body ? A. No.

Q. None whatsoever ? A. No.

Q. From your own recollection do you recall seeing any pimples around his neck ? A. No.

Q. From your own recollection, did he make mention of any sores or pimples. A. We will have to go back into his past medical history.

Q. I am asking you. A. That is where it is written down about his past medical history.

Q. I am asking you, Dr. Gaffney, just tell me if he told you anything about the scars. A. No.

Q. Did you make any mention to him about those scars. A.

A. No. I didn't see any scars.

Q. Did he bring any records regarding his personal condition from Bayonne Veterans Hospital and Perry Point ? A. From Perry Point.

Q. What did those records indicate ?

Tr. p 91 A. He had a very thorough work-up at Perry Point, extending over a period of months. He had the most exhaustive laboratory tests, including liver function tests, X-rays of his chest, X-rays of his entire intestinal tract, repeated blood Wassermans. That is a test for syphilis. He had three at Perry Point. The first one shows a one plus positive. The following two were negative.

Q. When did you read those records. A. I read those records after he

Tr. p 91a.

* * theft my office, on his visit, the first one, after my history and physical examination. He had a very extensive record. I told him to leave it with me; that I would read it and then for him to get in touch with me later.

Q. Did you study it ? A. I did.

Q. Were you satisfied that there was a history of syphilis present.

A. I was not. I noted the plus one Wassermann, and I also noted from the Perry Point history and from my history there was no history of syphilis.

The COURT. No what ?

THE WITNESS. No history of having had active syphilis at any time.

THE COURT. Can a person have a positive Wassermann test without having syphilis. A. on page 92 of T.

Tr. p. 92. A.- No. This is a one plus positive Wassermann, which we will call a doubtful Wassermann. * * * *

Q. Dr. Guffey, you testified that you made a very thorough study of his report. A. That is right.

Q. You noticed no scars ? A. No.

Q. Or lesions on his body at all ? A. Not that I--

THE COURT. You have asked him that. Don't go back to it.* * *

Tr. 2 MR. SCHNEIL. I would like to offer the report made by Perry Point and
92 turned over to Dr. Guffey by Mr. Bernhard.

THE COURT. IT MAY BE ADMITTED. (The clinical record heretofore marked for identification as P's Exhibit 2 was admitted in evidence.)* * You may read such portions of this exhibit as you consider relevant.

Mr. SCHNEIL, reading: No rinkl were demonstrable. There was one plus foot and ankle clonus. Distended veins were noted over the chest and abdomen, most marked on the right side. There was an ulcerated lesion on the medial aspect of the right foot, with some weeping.

Tr. p 92 Q. What is a lesion ? A. A lesion can be one of many things. An ulcer is a lesion. A boil is a lesion.

THE COURT. It is a break in the skin, isn't it ?

THE WITNESS. That is right.

BY MR SCHNEIL. Q. Your explanation is that it is an ulcer --

A. Just a plain ulcer that is leaking, as you call it, I think there.

* * * * * *

Tr. p. 95. Q. A hypothetical question: If you noted a patient with an ulcerated lesion of the medial aspect of the right foot with some weeping, would you take into consideration that the patient might have syphilis ?

Tr. p 96. A. When the patient was seen by me, the patient did not have, according to my records, an ulcerated lesion of his foot. You are reading from the Perry Point, which was some 14 months before I saw the patient.

Q. That is right. You did not see any lesion ? A. No, sir.

Tr. p 98. Q. Dr. Gaffney, in your examination of Mr. Bernhard at your office, you stated that you saw no scars on his body whatsoever. Did you remember by chance in the reports from Perry Point a notation that he had been operated on for an appendectomy several years ago ? A. I knew he had been operated on for an appendectomy. That is my record. You are talking about ulcerations and lesions of his feet.

Q. I am not talking about that now. A. I have a note in my record that he has an incision scar from an appendectomy. So I knew he had been operated on. I knew he had an appendectomy.

Q. Did you read that previously ?

THE COURT. What does an appendectomy have to do with this case, Mr. Stengel ?

THE WITNESS. (reading) "Appendectomy at the age of 14."

MR. STENGEL. Your Honor, the doctor testified that there were no scars on the man's body.

THE COURT. Very well. I see.

Tr. p. 103 Q. Dr. Gaffney, did you make arrangements for Mr. Bernhard to go to the hospital in the early part of January , 1952. A. I did.

Q. What did you tell him you were going to try and do for him ?

A. I told Mr. Bernhard I was going to do an exploratory operation, to make a definite diagnosis or confirm a diagnosis that had already been made, and if possible to perform corrective surgery for his condition.

THE COURT. And what was the condition ? A. The tentative diagnosis was, No. 1, cirrhosis of the liver; No. 2, possible cancer, with metastasis to the liver; and No. 3, gall bladder disease. They were my three impressions after my examination.

THE COURT. And which of these could not be determined without an exploratory operation ? A. None of them could, Your Honor.

Tr. p.104 Q. When he entered the hospital, did you order full tests given to Mr. Barnhart? A. When he entered the hospital on the 7th, I wrote the orders, and they were complete blood count, urinalysis, regular diet, and a thousand cc of glucose intravenously the following day.

* * *

Q. Did you order a Wassermann test? A. I did not.

* * * * * * *

Tr. p. 105 THE COURT. In other words, you would perform an exploratory operation on a syphilitic person? A. That is right.

* * * * *

THE COURT. And that is the customary practice among surgeons in the District of Columbia? A. I would say so, sir.

* * * *

THE COURT. My question was not what you would do, necessarily; it was not limited to that. But do you know whether it is the usual practice of surgeons in the District of Columbia? A. It is. Routine Wassermann are not

Tr. p. 106 done ordinarily. * * * * *

Q. (By Mr. Stengil) Do you perform operations on persons, * * * an exploratory operation on persons who have syphilis. A. Yes.

Q. How would you determine in the patient that they had syphilis? * * * A. If there are indications, you get a Wassermann test.

Q. What are the indications of syphilis.

THE COURT. I think that is too far afield.

Q. (By Mr. Stengil) Did you take any blood tests in your office? A. No.

Q. Did you take any blood tests after the operation? A. No.

Tr. p. 107. Q. Did you notice any nodules or lumps around Mr. Barnhart's neck? A. No.

Q. Did you notice any knots on his arm? A. No.

Q. In your experience, doctor, does a syphilitic patient, after an operation, heal as quickly as a person in good health? A. Very definitely.

Q. Does a syphilitic person have the same recuperative powers as for as wounds healing, as anybody else? A. Yes,...one yes, from my experience.

Tr. p. 107 Q. Did Mr. Bernhard's wound heal as quickly as you would have expected it? A. No. * * * Because of his development of a cough and some distention and diarrhea in the hospital.

Q. Didn't you know he had diarrhea prior to going to the hospital?

A. Prior to the hospital admission, he had diarrhea during the past three years, at times --not just prior to going to the hospital.

Tr. p. 108 Q. You also noted he had a cough prior to going to the hospital?

A. He had a cough for years.

Q. You didn't take that into consideration when you operated on him?

A. I did. I told him to cut down smoking, a month before I operated on him.

Q. And you feel that was sufficient to take care of anything that might have happened or would happen if the operation, the closing up process, went wrong? A. The closing up process didn't go wrong. * * * *

Q. Will you describe the operation? A. The incision was made below the rib margin on the upper right side. That is where the tumor mass was that I described. * * *

Tr. p. 109 * * * He did not find any evidence of malignancy or cancer. We took a piece of liver for biopsy, for study by the pathologists, in order to make a definite diagnosis. *

Tr. p. 111 Q. In entering the incision, how many layers did you close up from the time that you finished your explorations? A. Three.

Q. Did you use sutures on each of those? A. Yes.

Q. Did you use a absorbable suture? A. Yes,* * a absorbable suture in the fascia. * * * * * *

Tr. p. 112 Q. Doctor, was it necessary to perform or operate on exploratory operation, with the information that you had beforehand? A. It was necessary if I were to make a diagnosis and possibly correct anything that I could that the man had.

Q. You stated you had made your diagnosis. In the exploratory setting open, did you find any of those symptoms that you had decided might be present?

A. I found a condition, not a symptom.

Q. Of the ones you spoke about? A. Yes.

Tr. p. 112 Q. May I see your record ? Cirrhosis of the liver ? A. That is a disease, not a symptom.

Q. A liver metastasis ? A. Metastasis of the liver; that is a disease.

Q. Did he have that ? A. No. I have already testified he did not have cancer.

Q. Did he have gall bladder disease ? A. No.

Tr. p. 113 Q. Then he had none of the three ? A. He had the first one.

Q. He had cirrhosis of the liver ? A. A type of cirrhosis of the liver--fatty metamorphosis of the liver.

Q. Will you refer to the pathology report you received. A. I already have--fatty metamorphosis of the liver is the diagnosis..

Q. Does it say cirrhosis of the liver ? A. It says fatty metamorphosis.

THE COURT. Is that the same thing ?

THE WITNESS. It is a type of liver disease, a type of cirrhosis, a pre-runner of it.

BY MR. STEMPEL. Q. Is it a pre-runner of it ? Is it cirrhosis of the liver ? A. It is a type of cirrhosis of the liver.

Q. Doctor, will you pick up the histological examination report that you have ? A. Yes. * * * * * *

Tr. p. 114 Q. Doctor, I have before me a copy which has been accepted. I read the last paragraph to you, and advise me if it is correct or not. * * *

Tr. p. 115. Q. Is there a different meaning between the last sentence, in the microscopic examination, and the diagnosis ? A. No--no indeed.

Q. Does the examination say no evidence of cirrhosis ? A. It does.

Q. Then none of the three items that you diagnosed were actually present, were they ? A. I said that fatty metamorphosis was a forerunner of cirrhosis.

THE COURT. Please don't argue with the witness, Mr. Stempil. You may ask him questions, but please don't get into an argument with him.

Tr. p. 116 Q. Is it your understanding in your profession that abdominal operative abdominal wounds in patients afflicted with cancer, diabetes and syphilis heal slowly and incorrectly ? A. No . Cancer,yes, diabetes; not syphilis.

Tr. p. 116 Q. Is it your experience that infection unquestionably produces a more rapid disintegration of catgut ? A. Yes, that is right.

Q. And that a cough or a sneeze or a hiccup, or an increased abdominal pressure from whatever cause, does that cause a break in the catgut ? A. That is what causes a break, the distention and coughing. That causes a break in any type of a suture.

Tr. p. 118. Will you tell the Court and jury what you did on the last day of Mr. Bernhard's stay in the hospital. A. The hospital records--I am quoting from the hospital records. On the 19th of January, Mr. Bernhard was visited, his sutures were removed, and the wound is clean and healing; patient feels fine; and discharged--signed by me.

Q. Any other notation after that ? A. Yes.

THE COURT. You say the sutures were removed before the patient was released from the hospital ? A. That is the note on the hospital record, signed by me.

Tr. p. 120 BY MR. SHROPIL. Q. Is it a practice with a person who has a history of a cough, to remove the sutures before the wound is completely healed or closed ? A. The skin sutures have nothing to do with coming of a hernia. This man's skin is intact. The question of hernia is down deeper, where the catgut sutures were placed in the fascia. This man's skin is no problem in a hernia. * * * * I have an idea his cough and some distention he had, and quite a bit of retching, caused premature absorbtion of the sutures and breaking of them.

Q. Could you have foreseen this type of a situation from the examination made before the operation ? A. Not necessarily.

Q. You say you took the sutures out at the hospital ? A. So the hospital records say. * * * *

Tr. p. 122 Q. Dr. Saffney, at your office, after Mr. Bernhard had been discharged, he came to you on what day? A. His first office visit was on the 25th of January, 1952. * * * My records indicate that there was some serum in the wound, which was released. The wound was redressed and the patient advised to return to my office in five days. * * * The second visit was on the 31st. That is five days later--at which time there was some more serum released.

Tr. P. 122 * * * * And we

Tr. P. 123 found some separation of the fascial edges, that is, deep layers. That was the beginning of the hernia.

Q. How did you find that ? A. By feeling. * * *

Q. Did you tell him he had a hernia ? A. It was not definite at that examination. As I say, I felt some separation deep. And I reassured him and advised him to return on the 25th. That was five days later.

THE COURT. Did he return ? THE WITNESS. He returned on the 25th.

BY MR. SCHMIT. Q. What do your records indicate then ? A. My records indicate that the patient definitely now has an incisional hernia. He was informed of this and told it should be observed for a period of four weeks, when he would return to my office. * * * *

Tr. P. 123. Q. Did Mr. Bernhard tell you he was going to come back within four weeks ? A. Mr. Bernhard didn't tell me anything, accordingin to my records.

Q. Did you discharge him on the 25th of January, 1938 ? A. No, I didn't discharge him.

THE COURT. Did you tell him to come back ? A. I told him to come back in four weeks, your Honor.

THE COURT. Did he come back ? A. No, he did not.

MR. SCHMIT. He didn't say that.* * * He didn't say that he told him to come back in four weeks.

THE COURT. Please don't make remarks like that. You have to confine yourself to asking questions. Don't comment on the evidence. The Court alone has the right to comment on the evidence.

MR. SCHMIT. Q. Did you inform him that he had an incisional hernia? A. I did.

Q. What steps did you take to correct it at that time ?

Tr. P. 124. A. There were no steps I deemed advisable for him to take at that time.

Q. Isn't it the practice to take immediate steps to put him back in shipshape condition, when you find-- A. No. You have to wait a certain period of time until the tissue regains its normal tone, before you recommend an those people.

Tr. p. 125. Q. How big was that incisional hernia ? A. How big--? Oh, I think the incision is about six inches long, maybe. The hernia incision was through mostly the upper part of it, the upper and middle part. Of course, it has gotten longer since then.

Q. It has gotten longer ? A. Oh, yes.

Q. How do you know it has ? A. It happens I examined him a few weeks ago * * * here.

Q. Here in the courtroom, and you found it had gotten longer ?

A. Oh, yes.

Q. From the time you looked at it. Did you make any suggestion to Mr. Bernhard at that time ? A. When ?

Tr. p. 126: THE WITNESS. A suggestion regarding what ?

Q. By Mr. Stumpf. -As to what to do about the enlarged incisional hernia you counsel. A. No, I didn't recommend anything at that time. * * *

Q. Doctor, do you recall what your first dressing was after the operation ? * * * Yes. It would be a large pudding of gauze, with wide adhesive strips covering the entire wound, extending around on the patient's sides.

Q. How did you redress the wound on the first visit * * * at your office, doctor ? A. I redressed the wound the same way, with gauze, because there was some drainage; and large strips of adhesive tape.

Q. In your own opinion, was that sufficient ?

Tr. p. 127 A. Yes.

Q. To take care of anything that might have happened with reference to breaking open of the wound ? A. Yes; that is right.

Q. On the second visit, when you had on then there was an incisional hernia present, did you change your bandage ? A. Still the same--adhesive strapping with adequate gauze * * * The third visit there was no dressing applied at all.

Tr. p. 128. Q. What was the cause of this incisional hernia ? A. Coughing, abdominal distention, and probably some vomiting, would be the main causes.

Q. And to this day you have taken no steps to correct it ? A. * * * I have not been consulted about correcting it. * * * I have not been consulted since the 25th, when the patient departed from my care, about repairing or doing anything about this hernia.

Tr. p. 126. Q. Do you recall telling Mr. Bernhard to go to his family doctor and start on a diet, after the 28th ? A. To go back and go on his diet, go for his liver disease, yes.

Q. You did tell him that ? A. I imagine I did. That is where he went

Q. To his family doctor ? A. Dr. Colaroo, yes.

Tr. p. 136 ON DEFENDANT'S MOTION FOR A DIRECTED VERDICT.

MR. BAIN. I wish to move for a directed verdict in favor of the defendant Dr. Gaffney, because of the complete absence of any testimony of negligence.

THE COURT. Do you wish to be heard ?

MR. SCHEFF. Yes, your honor. The failure of an operation performed by a surgeon, although creating no presumption of lack of skill or care --

THE COURT. Don't read me any cases. Tell me what your point is. Failure of an operation does not create a presumption of negligence.

MR. SCHEFF. But it is a circumstance entitled to consideration in a malpractice action, coupled with other testimony. And in an action for malpractice, I feel there are certain facts presented, certain evidence presented and I think it is a question for the jury.

THE COURT. I am going to direct a verdict for the defendant , and I will state my reasons in detail in open court so that the jury can hear.

MR. SCHEFF. And after that, may I file a motion ?

THE COURT. It there is no use in filing motions. You can make an appeal You have a right under the rules to file a motion. But I rarely change my mind after I reach a decision after due deliberation. The Court is of the opinion that no case has been made out against the defendant justifying the submission of the any issue to the jury for two reasons: In the first place, there is no showing that the doctor was guilty of any negligence, or that he used any method not in accordance with recognized practice in the community among men or that he failed to do something which such recognized practice required him to do. No physician is a guarantor of the success of any mode of treatment or of any operation, any more than a lawyer can guarantee that he is going to win a case. All that a physician is required to do is to use the proper skill in accordance with the proper standards in his particular station of the profession in his community. There is no showing, as was urged in the beginning, that there was any negligence in electing an exploratory operation.

Tr. p. 157. There is no showing that there was any negligence in post-operative treatment, or any negligence in releasing the patient at the time he was released from the hospital. The second reason on which the Court bases its decision that there is no case sufficient for the jury is that no evidence tending to show that the testimony herein the plaintiff suffered resulted from anything the defendant failed to do, or that he should have done,or that Tr. p. 158 (or that)he did that he should not have done . In view of these circumstances, the Court will direct a verdict in favor of the defendant. And the Court might add this. Of course a physician, just as anyone else, is liable for negligence in the performance of his function, just as a lawyer would be liable if he were negligent, or a dentist, or an engineer or anyone else. But in the case of a professional man, a charge of negligence implies something more than just a claim for damages, as would be the case, say, in an automobile accident. A claim of negligence against a professional man is something directed against his reputation as well as being a claim for damages. And for that reason the Court wishes to state on the record that there is not the slightest evidence in this case which would justify any reflection on Dr. Gaffney's professional competence or his professional integrity or his thoroughness.

THE REPORTER CLERK. Will the original twelve members of the jury, please rise. Members of the jury, your verdict in this case is for the defendant, Wm B. Gaffney, by direction of the Court, and that is your verdict, so say you each and all.

(Accordingly, at 3 P.M. the trial was concluded.)

No. 13263

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARTHUR THEODORE BERNHARD,
Appellant

v.

DR. LEO P. GAFFNEY,
Appellee

Appeal from the United States District Court for the District of Columbia

---

J. HARRY WELCH,
H. MASON WELCH,
JOHN R. DAILY,
J. JOSEPH BARSE,
ARTHUR V. BUTLER
Attorneys for Appellee
Investment Bldg.,
Washington, D. C.

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

No. 13263

STATEMENT OF QUESTION PRESENTED

(1). The question is whether or not the Trial Judge was justified in granting a motion for directed verdict at the close of the plaintiff's case, or whether there was sufficient evidence of negligence to warrant submission of the issue to the jury.

(2). The question is whether or not there was an abuse of judicial discretion during the trial by the Court in its rulings which was prejudicial to the Appellant below.

TABLE OF CONTENTS

TABLE OF CASES

In The

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13263

ARTHUR THEODORE BERNHARD,
Appellant

v.

DR. LEO P. GAFFNEY,
Appellee

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

This is an action to recover damages for the alleged malpractice of the defendant, Dr. Leo P. Gaffney, a duly licensed physician, engaged in the practice of surgery in the District of Columbia. The Complaint stated that on or about January 7, 1952, Appellant engaged Appellee to perform an exploratory operation; the defendant performed the operation at Providence Hospital in the District of Columbia on, to-wit, January 7, 1952; the Appellant (plaintiff below) alleged that the defendant was negligent and/or incompetent in performing the operation, suturing the incision and in giving or failing to give post-operative treatments and advice.

The evidence produced by the plaintiff failed completely to support the allegations of negligence contained in the Complaint. An examination and resume of the evidence

will demonstrate that the Trial Court was clearly correct in directing a verdict for the defendant (Appellee).

The entire case was briefly reviewed and summarized by the Court below at the conclusion of the argument for directed verdict (Tr. 137, 138).

> "The Court is of the opinion that no case has been made out against the defendant justifying the submission of any issue to the jury, for two reasons:
>
> "In the first place, there is no showing that the Doctor was guilty of any negligence, or that he used any method not in accordance with recognized practice in the community among surgeons, or that he failed to do something which such recognized practice required him to do.
>
> "No physician is a guarantor of the success of any mode of treatment or of any operation, any more than a lawyer can guarantee that he is going to win a case. All that a physician is required to do is to use proper skill in accordance with the proper standards in his particular stratum of the profession in his community.
>
> "There is no showing, as was urged at the beginning, that there was any negligence in advising an exploratory operation. There is no showing that there was any negligence in post-operative treatment, or any negligence in releasing the patient at the time he was released from the hospital.
>
> "The second reason on which the Court bases its decision that there is no case sufficient for the jury is that there is no evidence tending to show that the incisional hernia the plaintiff suffered resulted from anything that the defendant failed to do, that he should have done, or that he did that he should not have done.
>
> "In view of these circumstances, the Court will direct a verdict in favor of the defendant.
>
> "And the Court might add this. Of course a physician, just as anyone else, is liable for negli-

gence in the performance of his function, just as a lawyer would be liable if he were negligent, or a dentist, or an engineer or anyone else.

"But in the case of a professional man, a charge of negligence implies something more than just a claim for damages, as would be the case, say, in an automobile accident. A claim of negligence against a professional man is something directed against his reputation as well as being a claim for damages. And for that reason the Court wishes to state on the record that there is not the slightest evidence in this case which would justify any reflection on Dr. Gaffney's professional competence or his professional integrity or his thoroughness."

The above quoted statement of the Court presents the entire issue in a very simple manner and a brief analysis of all the testimony will disclose that there was not one scintilla of evidence of negligence to submit to the jury.

The defendant doctor testified concerning the treatment, diagnosis, operation, etc., having been called as a witness by counsel for the plaintiff; that he made arrangements for Mr. Bernhard to go to the hospital in the early part of January, 1952 and told him that he was going to do an exploratory operation, to make a definite diagnosis or confirm a diagnosis that had already been made, and if possible to perform corrective surgery for his condition (Tr. 103). When he entered the hospital on the Fifth he wrote the orders and they were, complete blood count, urinalysis, regular diet, and a thousand cc of glucose intravenously the following day.

At this point, the Court stated (Tr. 104):

"You are using technical terms, and when you go so fast it is difficult to follow you."

The witness continued:

"A complete blood count, urinalysis, one thousand cc of glucose to be given intravenously the following day. That is a sugar solution to be given into the

vein the day before the operation to build them up a little bit, or give them a little boost for the operation." (Tr. 104)

Defendant doctor further stated it was not customary to order a Wasserman Test, and in response to a question by the Court (Tr. 104):

"Suppose a Wasserman test is ordered, or suppose it is discovered that the patient has syphilis, would that affect the question as to whether there should be an exploratory operation?"

Defendant testified that it would not (Tr. 105). He further testified that he would perform an exploratory operation on a syphilitic patient as well as on a person who does not have the disease and that that was customary practice among surgeons in the District of Columbia (Tr. 105, 106).

Defendant also testified concerning the operation describing the incision and the progress of the exploratory work done (Tr. 108, 109). He then described the closing of the wound in the following manner:

"The posterior layer and the peritoneum were closed with a running, plain catgut suture. Next, the anterior fascia layer was closed with a running suture of chronic catgut, this row being reinforced with several mattress, chronic catgut sutures. The skin layer was then closed with interrupted cotton sutures, dressing applied and adhesive applied to the abdomen." (Tr. 109, 110).

Upon being asked whether he put a restraining silk or any type of restraining suture above the suture used to close the wound, he stated:

"I used retention sutures in the anterior fascia layer, which is the important layer in the closure." (Tr. 110)

He also testified he did not leave any dead spaces in between the layers and that the wound was completely closed when sewed up (Tr. 111, 112).

After the man was discharged from the hospital, the sutures having been removed on January 15, which was his last hospital day (Tr. 119), he was directed to see the doctor at his office on the 18th of January and did so. (Tr. 122). At that time there was serum in the wound, which was released. The wound was re-dressed and the patient advised to return in five days (Tr. 122). At the second visit, on the 23rd., more serum was released and there was found some separation of the fascial edges, that is, the deep layers. That was the beginning of the hernia. (Tr. 123). He was advised to return on the 28th., which he did and the doctor's records indicated that he then definitely had an incisional hernia. He was informed of this and told it should be observed for a period of four weeks when he should return to the doctor's office (Tr. 123). The doctor did not discharge the patient, but told him to come back in four weeks. He did not come back (Tr. 124). There were no steps the doctor deemed advisable to take at that time (the 28th) with regard to the incisional hernia, as you have to wait a certain period of time until the tissue regains its normal tone before you re-operated. (Tr. 125).

The dressing and adhesive strips which covered the entire wound extending around on the patient's side, which was placed immediately after the operation and continued until last seen by the doctor, was considered sufficient in the doctor's opinion for the type of wound (Tr. 126, 127). The cause of the hernia was testified to be coughing, abdominal distention, and probably some vomiting would be the main causes (Tr. 128).

Plaintiff presented a Mrs. Mary Melinda Christophersen of Frederick, Maryland, who stated her occupation to be that of a registered nurse, a graduate of Shelby Hospital in Shelby, North Carolina, whose husband was a distant cousin to plaintiff's wife. Her testimony is

contained in the Transcript, beginning at page 45 and continuing through page 59, and in summary it merely relates that she saw him when he came home from the hospital; that he had a cough and she put a binder on him to help support his incision. She did not consider the bandage to be a supporting bandage. She described from her experience the procedure in sewing up a patient who has been subjected to an exploratory operation (Tr. 52, 53), stating that they usually have two or three heavy retention sutures, besides one straight line of your skin sutures on the outside. She further stated (Tr. 57) that stitches are ordinarily removed when they are discharged from the hospital, including the retention sutures.

On cross-examination, she testified that at the time she saw plaintiff on the day that he came home from the hospital he had adhesive tape on the incision; that he had two or three strips of the adhesive; that that is considered support and it depends upon how it is applied; that incisional hernias are not uncommon (Tr. 60).

The other testimony given in the case was that of the plaintiff and his wife and is merely a recitation of their views of the situation. This concluded the plaintiff's case.

SUMMARY OF ARGUMENT

The evidence was absolutely devoid of anything tending to establish any departure from the customary and approved practice for the treatment of the plaintiff while he was under the defendant's care. Since the physician can be held for negligence only when he has departed from the usual and customary practice of an ordinarily careful physician under similar circumstances, it follows that the plaintiff completely failed to establish his claim for relief.

The mere fact that subsequent to the exploratory operation he developed an incisional hernia, which is not an uncommon thing, is positively no evidence of negligence.

ARGUMENT

1. The Question Is Whether or Not the Trial Judge Was Justified in Granting a Motion for Directed Verdict at the Close of the Plaintiff's Case, or Whether There Was Sufficient Evidence of Negligence to Warrant Submission of the Issue to the Jury.

The burden of proof is upon the plaintiff to establish by *substantial evidence* (emphasis supplied) departure from the standard of care and skill ordinarily exercised by members of the profession in his or similar localities and that such departure caused the injury complained of. (*Rogers* vs. *Lawson,* 83 U. S. App. D. C. 282, 170 F. 2d 158).

Kasmer vs. *Sternal,* 1948, 83 U.S. App. D.C. 50, 165 F. 2d. 624;
Christie vs. *Callahan,* 1941, 75 U. S. App. D. C. 133, 124 F. 2d. 825
Gunning vs. *Cooley,* 1929, 58 App. D. C. 304, 30 F. 2d. 467, affirmed, 1930, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720;
Cayton vs. *English,* 1927, 57 App. D. C. 324, 23 F. 2d. 745;
Levy vs. *Vaughn,* 1914, 42 App. D. C. 146

In the present case, the testimony leads to only one conclusion, namely, that a condition existed for which an exploratory operation was necessary in order to aid the patient. The exploratory operation was accomplished. It confirmed the tentative or probationary diagnosis. The procedures in the operation were correct and no negligence was shown in any way whatsoever, either of commission or omission. Subsequent to the operation, during the healing processes, an incisional hernia occurred. This is neither evidence of, nor proof of, negli-

gence and is insufficient and too meagre to submit to a jury.

In *Wilson* vs. *Borden,* 61 App. D. C. 327, 62 F.2d. 386, it is stated, at page 330:

> "Plaintiff's evidence may have tended to prove that her arm upon her discharge by defendant was in an unsatisfactory condition, but, assuming that it did, that would establish 'neither the neglect and unskilfulness of the treatment, nor the causal connection between it and the unfortunate event'. *Ewing* vs. *Goode* (C.C.) 78 F. 442, 443. All that was required of defendant in undertaking to treat the plaintiff was that he exercise the ordinary care and skill of his profession in the District of Columbia. *Cayton* vs. *English,* 57 App. D. C. 324, 23 F. (2d) 745; *Hazen* vs. *Mullen,* 59 App. D. C. 3, 32 F. (2d) 394. Plaintiff alleged lack of skill and negligence. She proved neither."

In the case of *Ewing* vs. *Goode,* 78 Fed. 442 C.C., cited in the *Wilson* case, supra, Justice Taft aptly stated the law to be:

> "Before the plaintiff can recover, she must show by affirmative evidence—first, that the defendant was unskillful or negligent; and second, that this want of skill or care caused injury to the plaintiff. If either element is lacking in her proof, she has presented no case for the consideration of the jury. The naked facts that defendant performed operations on her eye, and that pain followed, and that subsequently the eye was in such a bad condition that it had to be extracted, establish neither the neglect and unskillfulness of the treatment, nor the causal connection between it and the unfortunate event."

This language was cited with approval by this Court in *Cayton* vs. *English,* 57 App. D. C. 324, 23 F. (2d) 745, and the rule has been repeatedly re-affirmed by this Court.

Levy vs. *Vaughn,* 42 App. D. C. 146
Bonner vs. *Conklin,* 61 App. D. C. 336, 62 F. (2d) 875

If there was any evidence to be presented on the question of whether the manner in which the operation was performed and the wound sutured and whether or not the pre-operative and post-operative treatment was proper and correct, it certainly involves a question of the merits of diagnosis, operative procedure, suturing or incisional wounds and after-care. These are matters of scientific treatment and cannot be determined without the aid and counsel of expert opinion. In *Rogers* vs. *Lawson,* supra, the Court stated, at page 285:

> "It involves a question of the merits of diagnosis and scientific treatment. This cannot be determined by a lay jury without the aid of expert opinion."

We do not believe there is one word of testimony in this case from anyone capable or experienced in proper surgical procedures which would permit the Court to have submitted this case to a jury. There is nothing whatever in the record, except the history of the examination, operation and after-treatment, all in accord with good and approved practice and not one iota of evidence indicating negligence or failure on the part of the physician, nor a scintilla of evidence connecting the incisional hernia with any neglect of any kind on the part of the surgeon.

Appellant's counsel has attempted, in setting up the propositions to be considered by this Court, to restate in four different ways the simple problem of whether or not a directed verdict should have been granted in this case, and that is all that is set forth in matters, (1), (2), (3) and (4) of Appellant's dissertation.

With respect to the duty and right of the Court to grant a motion for directed verdict, we respectfully call the Court's attention to its opinion in Numbers 11,991 and 11,992, decided September 20, 1956, *Eastern Air Lines, Inc.* vs. *Union Trust Co., et al.,* wherein the matter of passing upon a motion for new trial is thoroughly

and completely analyzed and discussed. While it is true that in that case the question was not upon a motion for directed verdict, but upon a motion for new trial, it is submitted that the reasoning applies as well here as there, for as was stated in *Aetna Casualty & Surety Co.* vs. *Yeatts,* 122 F. (2d), 350 (1941), at page 354, and quoted by this Honorable Court in the opinion just referred to:

> "To the federal trial Judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require."

Obviously, the Law also gives the same power to the Judge in dispensing justice to put an end to litigation which has no place in the court, and where the evidence is so lacking in probative value, as it was in this case, it would be futile for the Court to have permitted the case to go to the jury, knowing that any verdict, should one have been given by the jury, would have to be set aside or that a new trial would be granted, thus endlessly continuing litigation.

We, therefore, conclude, as did the Court below (Tr. 137), there is no showing that the doctor was guilty of any negligence or that he used any method not in accordance with recognized practice in the community among surgeons, or that he failed to do something which such recognized practice required him to do and the Court did not stop there, but added:

> "There is no showing, as was urged at the beginning, that there was any negligence in advising an exploratory operation. There is no showing that there was any negligence in post-operative treatment, or any negligence in releasing the patient at the time he was released from the hospital."

Under these circumstances, it is respectfully submitted that no case was made out for submission to a jury.

2. The Question Is Whether or Not There Was an Abuse of Judicial Discretion During the Trial by the Court in Its Rulings Which Was Prejudicial to the Appellant Below.

A fair appraisal of the entire record in this case fails to show the slightest lack of judicial discretion on the part of the Court below. In fact, the record does disclose that the Court, in the interest of time and justice, was not only anxious that the case move along, but was most courteous and helpful in every respect. Counsel for plaintiff below was accorded every opportunity to present his case and to do it without hindrance of any kind. Because the Court, during the taking of testimony, makes reference to the fact that certain procedures are improper on the part of counsel, or that the jury will have to draw their own conclusions from the testimony, and not permit the witness to form conclusions, is certainly no abuse of judicial discretion, nor is there anything wrong in the Court admonishing counsel or witnesses, or both, not to go over what has already been testified to by the witness.

Such orderly conduct of the trial not only failed to come within the description of abusive discretion, but on the contrary, is proper use of discretion in order to expedite the business of the Court. We do not believe anything referred to by Appellant under Point V of his brief is correct or justified in attempting to imply that there was any abusive discretion on the part of the Court.

CONCLUSION

It is respectfully submitted that there was no evidence whatsoever of negligence presented in this case, and to use the oft-employed phrase, there was not even a scintilla of evidence of negligence or harm which came to the plaintiff as a result of negligence.

The contentions complained of, namely, an incisional hernia following an abdominal exploratory operation and improper post-operative care, fall by the wayside when the testimony is analyzed. No one testified to any negligence of any kind. No qualified witness was presented or gave any testimony that the entire treatment of the case on the part of the defendant below was not in accord with good and approved practice. The plaintiff failed to establish a case of negligence, since he produced no evidence of negligence. Therefore, there being a complete and total failure to show the elements required in a malpractice case, the Trial Court was entirely correct in directing a verdict in favor of the defendant and its judgment should be affirmed.

Respectfully submitted,

J. Harry Welch,
H. Mason Welch,
John R. Daily,
J. Joseph Barse,
Arthur V. Butler
Attorneys for Appellee
Investment Bldg.,
Washington, D. C.